Jurisdictional Statement

81-1020

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EXXON CORPORATION, GULF OIL CORPORATION AND THE LOUISIANA LAND AND EXPLORATION COMPANY,
Appellants,

v.

RALPH EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, et al.
Appellees.

On Appeal from the Supreme Court of the State of Alabama

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the federal regulatory scheme for oil and gas price control, as established by the Natural Gas Act, the Natural Gas Policy Act of 1978, and the Emergency Petroleum Allocation Act, preempts, under the Supremacy Clause, an Alabama severance tax statute which expressly prohibits the producer of oil or gas from passing on, directly or indirectly, to its purchaser the cost of such tax.

2. Whether the Contract Clause of the Federal Constitution prevents Alabama from passing an oil and gas severance tax statute which voids or prevents the enforcement of certain preexisting contractural provisions that grant the producer the right to recover all or a portion of the cost of its severance tax burden from parties to the leases, purchase contracts, or other agreements containing such provisions.

3. Whether producers of oil and gas in Alabama are denied the equal protection of the law guaranteed by the fourteenth amendment to the Federal Constitution by a severance tax statute which forces producers as a class to bear the burden of tax imposed on royalty interests and which distributes this additional tax burden unequally among the producers.

4. Whether the Alabama oil and gas severance tax statute, which defines producers of oil and gas and royalty owners as members of one class for purposes of imposing such tax, but which is amended not only to exempt royalty owners from payment of a tax increase but also to tax producers on the value of production attributable to such royalty owners, violates the Equal Protection Clause of the fourteenth amendment to the Federal Constitution.

LIST OF PARTIES TO PROCEEDINGS BELOW

Appellees Below: [1]

Anderman Operating Company, a corporation; Citmoco Services, Inc., a corporation; Exchange Oil and Gas Corporation; Exxon Corporation, a corporation; Getty Oil Company, a corporation; Gulf Oil Corporation, a corporation; The Louisiana Land and Exploration Company, a corporation; Midroc Operating Company, a corporation; Petroleum Corporation of Texas; Placid Oil Company; Pruet Production Company, a corporation; Terra Resources, Inc.; Union Oil Company of California; and Warrior Drilling and Engineering Company, Inc., a corporation. [2]

Appellant Below:

Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama.

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1 Although there were fourteen Appellees below, only Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company bring this appeal. Additional parties, Alabama Gas Corporation, Alagasco Pipeline Company, Southern Natural Gas Company and Coronado Transmission Company were parties in the trial court but did not participate in, and were not regarded as Appellees or Appellants in, the proceeding before the Supreme Court of Alabama. Nevertheless, they are being treated as Appellees in this proceeding and have been served with copies of the Notice of Appeal to the Supreme Court of the United States and this Jurisdictional Statement.

2 The listing required by Rule 28.1 naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Appellants is contained in Appendix 0.

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OPINIONS BELOW

The opinion of the Supreme Court of Alabama which is sought to be reviewed was entered on July 10, 1981. This opinion appears in the Official Reports for Alabama at 404 So. 2d 1 (Ala. 1981), and Volume 15 of the Alabama Bar Reports at page 1796, and is included herein as Appendix A. The opinion of the trial court, the Circuit Court of Montgomery County, Alabama, does not appear in any official or unofficial report but is included herein as Appendix B.

JURISDICTIONAL BASIS OF THIS APPEAL

This is an appeal from the final judgment of the Supreme Court of Alabama holding constitutional an Alabama oil and gas severance tax statute that was challenged on several grounds by the appellant-taxpayers as being repugnant to the Constitution and laws of the United States. The opinion and judgment of the Supreme Court of Alabama were entered on July 10, 1981. After timely applications for rehearing were filed, an order was entered denying the rehearing on September 4, 1981. The Notice of Appeal was timely filed with the Clerk of the Supreme Court of Alabama on November 23, 1981, and was also timely filed with the Clerk of the Circuit Court of Montgomery County, Alabama on November 23, 1981.

This Court's jurisdiction over this appeal is conferred by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

This appeal involves the validity of an Alabama statute under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, the Contract Clause of the United States Constitution, art. I, sec. 10, cl. 1, and the Equal Protection Clause of the Fourteenth Amendment. The challenged statute is an Alabama oil and gas severance tax statute, Act No. 434 of the

1979 Regular Session of the Alabama Legislature, which is set forth in Appendix I. The relevant Constitutional provisions are set forth in Appendix J.

Also involved are federal statutes related to the regulatory scheme for prices of natural gas, oil and petroleum products. The statutes pertaining to the federal regulatory scheme for natural gas are the Natural Gas Act, 15 U.S.C. §§717 *et seq.*, and the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301 *et seq.* The pertinent sections, 15 U.S.C. §§717(a) - (b), 717c and 15 U.S.C. §§3319-3320 are set forth in Appendices K and L respectively. The statute pertaining to the federal regulatory scheme for oil and petroleum products is the Emergency Petroleum Allocation Act, 15 U.S.C. §§751, *et seq.* The pertinent sections, 15 U.S.C. §§753, 757 are set forth in Appendix M. (While the President's standby authority for price regulation of petroleum products has terminated by virtue of 15 U.S.C. §760g, it was in effect during the time pertinent to this case.)

STATEMENT OF THE CASE

Appellants are producers of oil and gas in Alabama, who seek on various federal constitutional grounds to invalidate an Alabama severance tax amendment which by its provisions increased the Alabama oil and gas severance tax and barred Appellants from passing through the cost of the tax increase to their customers or to other parties who had agreed by preexisting contracts to bear a portion of this cost. The amendment also exempted royalty owners from payment of the increase and required other producers to bear the burden of the tax increase attributable to the production of the royalty owners.

The challenged statute was enacted as Act 434 by the 1979 Regular Session of the Alabama Legislature, and was in effect from September 1, 1979 until repealed May 28, 1980. During

the effective period of the statute, Appellants paid their liability for the increase under protest and filed tax refund suits seeking to invalidate the tax and recover the protested payments in the Circuit Court of Montgomery County, Alabama. Successive similar suits were filed as additional taxes were paid and protested. All of the suits (along with similar suits filed by other Plaintiffs) were consolidated for trial. On June 12, 1980, the trial court ruled in favor of Appellants on all counts, holding the statute unconstitutional under the Alabama Constitution and the Constitution and laws of the United States. The trial court decided the cases in one opinion, although separate judgments were entered for the various Plaintiffs.

Judgments entered by the trial court ordered tax refunds of $1,529,764.70, $25,988.14 and $55,187.49 for Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company (Appellants) as well as other refunds for other Plaintiffs. See Appendix G.

On July 30, 1980, the State filed a Notice of Appeal with the trial court and on July 10, 1981, the Supreme Court of Alabama reversed, holding the statute constitutional. After timely applications for rehearing were filed an order was entered denying the rehearing on September 4, 1981. The Notice of Appeal was filed in the Supreme Court of Alabama on November 23, 1981.

The questions and grounds presented for review in this appeal were presented in briefs filed with the trial court prior to its decision, were stated in the trial court's opinion, and were renewed in briefs before the Supreme Court of Alabama. The trial court held the challenged statute was unconstitutional under the Supremacy Clause, the Contract Clause and the Equal Protection Clause. The Supreme Court of Alabama held the statute constitutional, reversing the trial court on all points.

STATEMENT OF FACTS

Appellants are lessees and working interest owners engaged in oil and gas production in Alabama. In addition, Exxon and Gulf are operators of certain wells or production units and are also royalty owners.

Appellants all have contracts with other parties which obligate the other parties to be responsible for, or make reimbursement for, severance taxes. Appellants have gas sales contracts which define "additional tax" as covering an increase in production or severance taxes and which provide that "Buyer shall reimburse Seller for such additional tax." Additionally, Gulf is a party to a Casinghead Gas Contract which provides that all production and severance taxes "shall be borne by Seller and by Purchaser in the same proportions respectively that the parties from time to time share the proceeds" of the gas products to which the taxes relate. Louisiana Land and Exploration (as Lessee) has an Oil, Gas, and Mineral Lease with T. R. Miller Mill Co., Inc. (as Lessor/Royalty-Owner), which provides that Lessor "shall bear and pay . . . Lessor's proportionate royalty share of . . . all applicable severance production and other such taxes levied or imposed upon production from the leased premises." These contracts were the subject of a stipulation between the parties in the Trial Court as to certain facts with respect to the contracts. Pertinent portions of this stipulation are included in Appendix N.

The challenged Alabama severance tax statute (Act 434 of the 1979 Regular Session, Alabama Legislature) imposed an oil and gas severance tax increase from four to six percent upon Appellants as producers of oil and gas. It contained the following provision (hereinafter referred to as the "Pass-Through Prohibition") prohibiting the taxpayer-producers from passing on the tax burden of the increase:

> The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producers shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.

1979 Ala. Acts. No. 434, Sec. 1(e).

It also contained the following provision exempting royalty owners from the increase in taxes:

> Any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefor.

1979 Ala. Acts No. 434, Sec. 1(d).

The trial court found that these provisions, when construed in concert, not only exempted royalty owners from payment of the tax increase but also required the producer to pay a tax on the royalty owner's share of the production attributable to the royalty owner's ownership of the mineral fee. The producer was then restricted by the statute from passing on the unequal tax burden. See Trial Court Opinion p. 29; App. B, p. 36b.

Under application of the statute in question, Appellants paid under protest to the state for the period involved the entire two percent increase in severance tax applicable to the entire production from the leases, without deduction of any amount in respect of the royalty interests. Because of the Pass-Through Prohibition, Appellants were unable to seek reimbursement for the tax paid under the above contract provisions, either from

oil and gas purchasers or royalty owners. The evidence shows leases involved provided for royalty interests from twelve and one-half percent to as high as fifty-four percent. The disproportionate burden of the tax increase borne by producers under the act was magnified and progressively increased depending upon the percentage of production to which the royalty owner was entitled. See Trial Court Opinion page 29; App. B, p. 36b.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE PASS-THROUGH PROHIBITION OF THE ALABAMA OIL AND GAS SEVERANCE TAX STATUTE SIGNIFICANTLY INTERFERES WITH THE FEDERAL REGULATORY SCHEME CONCERNING THE TRANSPORTATION AND SALE OF OIL AND NATURAL GAS, IN VIOLATION OF THE SUPREMACY CLAUSE AS INTERPRETED BY THIS COURT IN *MARYLAND V. LOUISIANA.*

The challenged Alabama severance tax statute contained the following Pass-Through Prohibition requiring the producer to bear the tax exclusively and prohibiting the passing on of the tax burden:

> The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.

1979 Ala. Acts No. 434, Sec. 1(e).

During the period this statute was in effect, the prices for natural gas, oil and petroleum products were subject to federal regulation. Natural gas was then subject and continues to remain subject to federal regulation by virtue of the Natural Gas Act, 15 U.S.C. §§717 *et seq.*, and the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301, *et seq.* In the Natural Gas Act, Congress declared "that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. §717(a). Regulation by the Federal Power Commission and now the Federal Energy Regulatory Commission was authorized. 15 U.S.C. §717c. The Natural Gas Policy Act of 1978 extended the scope of the regulations to cover intrastate sales of natural gas, imposed a maximum lawful price on the first sale of all production of natural gas, 15 U.S.C. §3319, and provided that the seller's recovery of state severance taxes would not cause the sales price to exceed the maximum lawful price, 15 U.S.C. §3320. The Emergency Petroleum Allocation Act authorized regulations establishing ceiling prices for oil and petroleum products. 15 U.S.C. §757. [3]

In *Maryland v. Louisiana*, _____ U.S. _____, 49 U.S.L.W. 4562 (May 26, 1981), the Court held that Louisiana's First-Use Tax Act was unconstitutional under the Supremacy Clause because a statutory provision of the act interfered with the federal scheme for regulating the price of natural gas. The Louisiana statute expressly prohibited enforcement of any contract provision which attempted to allocate the cost of the tax to any party other than the ultimate purchaser. The follow-

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3 The challenged Alabama statute was superseded by other legislation on May 28, 1980, well before September 30, 1981, when the President's standby authority for price regulation of petroleum products terminated by virtue of 15 U.S.C. §760g, and was also prior to President Reagan's Order of January 28, 1981, exempting the remaining petroleum products from price regulations, 46 Fed. Reg. 9909.

ing language of the Court is relevant:

> Under the present law, natural gas owners are entitled to recover from their customers all legitimate costs associated with the production, processing, and transportation of natural gas. See ***FPC v. United Gas Pipe Line Co.***, 386 U.S. 237, 243 (1967) (cost of service normally includes proper allowance for taxes and this allowance is "obviously within the jurisdiction of the Commission"). As part of the First-Use Tax, Louisiana has directed that the amount of the Tax should be "deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas." 47 La. Rev. State. §1303C. The Act further provides that an owner shall not have an enforceable right to seek reimbursement for payment of the Tax from any third party other than a purchaser of the gas, ***ibid.***, even though the third party may be the owner of marketable hydrocarbons that are extracted from the gas in the course of processing.
>
> The effect of §1303C is to interfere with the FERC's authority to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers.
>
> . . . Owners of natural gas are foreclosed by the operation of §1303C from entering into valid contracts requiring the owners of the extracted hydrocarbons to reimburse the pipelines for costs associated with transporting and processing these products.

49 U.S.L.W. at 4568-69.

Similar cases are *Mobil Oil Corp. v. Dubno*, 492 F. Supp. 1004 (D. Conn. 1980), *aff'd in part and appeal dismissed in part*, 639 F. 2d 919 (2d Cir. 1981), *cert. denied*, _____ U.S. _____, 49 U.S.L.W. 3954 (June 22, 1981), and *Mobil Oil Corp. v. Tully*, 499 F. Supp. 888 (N.D.N.Y. 1980), *aff'd in part*, 639 F. 2d 912 (2d Cir. 1981), *aff'd*, 653 F. 2d 497 (Temp. Emer. Ct. App. 1981). These cases held that pass-through prohibitions in the Connecticut and New York tax statutes were unconstitutional under the Supremacy Clause because they frustrated the full effectiveness of the federal regulatory policy with respect to price regulation of petroleum products. The statutes of the two states contained provisions which prohibited the pass-through of the tax in certain instances. The courts noted that pricing of petroleum products was exclusively subject to federal regulation and that, *even* as to those products which by regulation were designated as being "*exempt*" from federal price regulation, the states were precluded from regulating prices of these products by prohibiting the pass-through of costs. Judge Blumenfeld in *Dubno* stated:

> Because it subjects to price regulation petroleum products that federal authorities have decided should be free of price regulation, [the Connecticut statute] "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the [Emergency Petroleum Allocation Act]. *Hines v. Davidowitz, supra*., 312 U.S. at 67, 61 S. Ct. at 404.

492 F. Supp. at 1014. In *Mobil Oil Corp. v. Tully*, 653 F. 2d 497 (Temp. Emer. Ct. App. 1981), the court noted that, even though President Reagan's Executive Order of January 28, 1981, exempted the remaining petroleum products from pricing regulations, the standby authority continued in effect under 15 U.S.C. §760g and, therefore, the matter of pricing was still subject to federal regulation. The court held that New York's

pass-through prohibition constituted price regulation under the state's police power and was unconstitutional under the Supremacy Clause. The following language is relevant:

> Any attempt by New York State to affect the structure of prices charged by the oil companies pursuant to federal regulations is barred by conflict with the federal scheme. *** The state statute under attack here is an instrument of price control and in conflict with the objectives of the program.

653 F. 2d at 502.

The foregoing cases recognize the extensive federal regulatory scheme for oil and gas price regulation which precludes attempts by the states to dictate how costs should be borne and allocated. The present case presents a substantial question because the Alabama Pass-Through Prohibition interfered with the federal regulatory scheme for oil and gas prices just as did the provision in Louisiana's First-Use Tax that was held unconstitutional in ***Maryland v. Louisiana, supra.***

Although the decision of this Court in ***Maryland v. Louisiana*** was decided after submission of original briefs to the Alabama Supreme Court, the decision was presented to the court in Appellant's Brief in Support of the Motion for Rehearing. Despite the fact that their announced decision was directly in conflict with the holding of this Court in ***Maryland v. Louisiana***, the Alabama Supreme Court refused to reverse their decision or grant a rehearing. This Court has found that a conflict between a decision of the highest state court and that of the Supreme Court in a matter of federal law is a strong reason for granting certiorari. ***William E. Arnold Co. v. Carpenters District Council,*** 417 U.S. 12, 14 (1974); ***Pittsburg v. Alco Parking Corp.,*** 417 U.S. 369, 371-372 (1974). Rule 17 of the rules of this Court also lists such conflict as one of the special and important

reasons for granting certiorari. Such a conflict should justify no less the granting of appeal in the instant case.

II. THE PASS-THROUGH PROHIBITION OF THE ALABAMA OIL AND GAS SEVERANCE TAX STATUTE CONSTITUTES AN UNCONSTITUTIONAL IMPAIRMENT OF PREEXISTING CONTRACTUAL OBLIGATIONS BECAUSE IT NULLIFIES SIGNIFICANT VESTED RIGHTS GRANTED TO PRODUCERS UNDER LEASES, PURCHASE CONTRACTS, AND OTHER AGREEMENTS, AND IMPOSES UPON THEM AN UNANTICIPATED AND SUBSTANTIAL ECONOMIC BURDEN, WITHOUT SERVING ANY LEGITIMATE END, AND IN FACT OPERATES CONTRARY TO THE VITAL INTERESTS OF THE GENERAL PUBLIC AS EXPRESSED BY CONGRESS.

In the trial court, the parties stipulated that the Appellants had entered into leases, purchase contracts, and other agreements whereby the other contracting parties had agreed to pay, or reimburse Appellants for, severance taxes and other similar taxes. The stipulation (pertinent parts of which are set forth in Appendix N) mentioned, as examples, an oil and gas lease which obligated the other party (the lessor-royalty owner) to pay its proportionate share of the taxes, a gas purchase contract which obligated the other party (the buyer) to make reimbursement for any increase in severance taxes, and a casinghead gas contract which obligated the other party (the buyer) to bear its proportionate share of the severance taxes. The stipulation also provided that a "substantial portion of Plaintiffs' [Appellants'] oil and gas production is sold in interstate commerce to Purchasers who are not consumers of oil and gas" and that "[s]ome of such purchasers, in turn, have gas contracts with others that provide for pass-through of severance taxes." Trial Transcript p. 1374; App. N, p. 3n.

Both the Federal and State Constitutions expressly prohibit the State from "impairing the obligations of contracts." Art. I, §10, Constitution of the United States; Art. I, §22, Alabama Constitution.

Recent decisions reflect this Court's willingness to invalidate state laws which impair contractual obligations in violation of the Federal Constitution. ***See Allied Structural Steel Co. v. Spannaus***, 438 U.S. 234 (1978) (holding unconstitutional a Michigan statute which subjected an employer with a certain pension plan to a "pension funding charge" upon termination of the plan, even though under the plan the company was free to terminate it and distribute the assets according to a predetermined method); and ***United States Trust Co. v. New Jersey***, 431 U.S. 1 (1977) (holding unconstitutional two state statutes which repealed a prior legislative covenant that revenues that had been pledged would not be used for other than permitted purposes).

In ***Allied Structural Steel Co. v. Spannaus***, 438 U.S. 234 (1978), the Court described the two-step procedure for determining whether an unconstitutional impairment of contractual obligations has occurred. "[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Id.* at 244. The Court further stated:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, these rights and obligations are binding under the law, and the parties are entitled to rely on them.

Id. at 245. In *Spannaus* the Court found substantial impairment occurred because the statute "nullifie[d] express terms of the company's contractual obligations and impose[d] a completely unexpected liability in potentially disabling amounts." *Id.* at 247.

The second step in this analysis involves a determination as to whether the impairment is necessary "to safeguard the vital interests" of the state's citizens and is a reasonable and appropriate means to that end. *Id.* at 242. In *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), the following factors were relevant to the second step determination: (1) whether an emergency existed, (2) whether the law was enacted to protect a basic societal interest, (3) whether the relief was appropriately tailored to the emergency, (4) whether the imposed conditions were reasonable, and (5) whether the legislation was limited to the duration of the emergency. In *Spannaus*, the Court noted that Minnesota's statute imposing a "pension funding charge" upon termination of a plan or closing of an office within the state "was not even purportedly enacted to deal with a broad, generalized economic or social problem," and "did not operate in an area already subject to state regulation." 438 U.S. at 250. The impairment was therefore unconstitutional.

When the two-step procedure is followed as to the challenged Alabama statute, it is clear that a substantial impairment occurred because the statute nullified the express terms of various types of contracts and imposed large completely unexpected liabilities. With respect to the second step, the act itself did not declare an emergency, and the Pass-Through Prohibition was not "tailored" or "limited" to any emergency. [4]

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4 The Pass-Through Prohibition "is certainly not an exercise of a taxing power but a police power affecting the price structure" of oil and gas. *Mobil Oil Corp. v. Tully*, 639 F. 2d 912, 918 (2d Cir. 1981).

No "basic societal interest" was protected, and the Pass-Through Prohibition was not "reasonable." The entire matter of oil and gas prices was already subject to an extensive federal regulatory scheme, as had been noted. There was no emergency justifying state action. Moreover, as the factual stipulation (Appendix N, p. 3n indicates, most of Appellants' oil and gas production was sold in interstate commerce. Alabama had no valid interest in impairing pass-through provisions in the contracts between Appellants and these purchasers or in other contracts pertaining to costs and prices.

Although it may be admitted that the State may serve a valid public interest in the imposition of a tax, no ***general*** public interest is served by the abrogation of existing contract provisions between parties that obligate one of the parties to bear the burden of the tax. To void provisions whereby royalty owners are obligated under lease contracts to bear a share of the tax burden imposed on oil and gas owners is to serve the narrow interest of those royalty owners indebted under such provisions. This Court found in the ***Blaisdell*** case that legislation which might satisfy the Contract Clause must be addressed to a legitimate end, "not for the mere advantage of particular individuals but for the protection of a basic interest of society." ***Home Building & Loan Ass'n v. Blaisdell***, 290 U.S. at 455. And further, "[t]his principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." *Id.* at 439.

The impairment of gas purchase contracts that provide for severance tax cost reimbursement to be included in the contract price for the gas may similarly not be abrogated by state law under the decisions of this Court. Such impairment cannot serve a legitimate end in the vital interest of the general public when the federal law and regulations have already permitted such reimbursement to be enforced in the general public interest. This determination of the interests of the public by the federal

government must supersede any contrary determination by state law under the Supremacy Clause.

The question is substantial because Alabama's Pass-Through Prohibition impairs a variety of contractual provisions, interferes with the extensive federal regulatory scheme for oil and gas prices, fails to safeguard the valid interests of Alabama residents, and imposes large unexpected liabilities contrary to the impaired provisions in the contracts.

III. THE PASS-THROUGH PROHIBITION OF THE ALABAMA OIL AND GAS SEVERANCE TAX STATUTE, IN CONCERT WITH THE ROYALTY OWNER EXEMPTION, FORCES PRODUCERS OF OIL AND GAS AS A CLASS TO BEAR THE BURDEN OF A TAX INCREASE IMPOSED ON ROYALTY INTERESTS AND ARBITRARILY AND UNREASONABLY DISTRIBUTES THIS ADDITIONAL TAX BURDEN UNEQUALLY AMONG PRODUCERS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

It is a recognized general principle that classifications may be made in state tax legislation without violating the Equal Protection Clause of the fourteenth amendment to the Federal Constitution. *Charleston Federal Savings and Loan Ass'n v. Alderson*, 324 U.S. 182 (1945), *reh. denied*, 324 U.S. 888 (1945). However, this general rule is subject to the qualification that there be equality and uniformity within each class. *Hopkins v. Southern California Telephone Co.*, 275 U.S. 393 (1928). This requirement has been interpreted by this Court to mean that a tax statute must operate alike on all persons and property similarly situated or circumstanced that belong to the same class. *Walters v. St. Louis*, 347 U.S. 231 (1954); *Ohio Oil Co. v. Conway*, 281 U.S. 146 (1930).

Assuming arguendo that royalty owners may be treated as a separate class from other producers of oil and gas under a state severance **tax** statute, there is no constitutional basis for treating some working interest owners differently from others under the same statute. Working interest owners are properly considered one class for purposes of state severance taxes on the occupation of mining and producing minerals from the ground. *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923). In that case, lessees of mineral lands who were actively engaged in mining and producing iron ore from the lease premises were subject to a Minnesota Occupation Tax on Mining. The mining companies complained on various grounds that the classification and taxation of ore producers was invalid under the fourteenth amendment to the Federal Constitution. The Court held that the Minnesota tax was an occupation tax, laid "on the business of mining the ore, which consists in severing it from its natural bed and bringing it to the surface where it can become an article of commerce." *Id.* at 176-177. The tax was ruled valid when laid on those who were engaged in that business and laid on them solely because they were so engaged. *Id.* at 177.

The Alabama oil and gas severance tax is an occupation tax imposed on those granted the privilege of engaging in the occupation of producing oil and gas. As this Court has noted in previous cases, it is proper for a state to impose an equal tax on those engaging in such an occupation. However, having established a valid classification for tax purposes, the state must then impose an ***equal*** tax burden on all those in the class, or the tax is invalid. When Act 434 increased the Alabama severance tax, the burden of that increase was allocated only to producers or working interest owners. The tax imposed on the royalty share of production was made the liability of the producer or working interest because language of the Pass-Through Prohibition required the tax increase to be "absorbed and paid by those persons engaged in the business of producing or severing oil or gas only." Ala. Act No. 434, Sec. 1(e). By requiring each working interest owner to bear the tax increase attributable to

his royalty interest, the statute imposed an unequal tax burden on working interest owners. A working interest owner subject to a fifty-four percent royalty interest was required to bear almost *five times* the additional tax burden from the increase as was a producer subject to only a one-eighth royalty interest. There is no basis in fact or circumstance which justified such arbitrary, unequal treatment.

IV. THE ALABAMA SEVERANCE TAX STATUTE, WHICH DEFINES PRODUCERS OF OIL AND GAS AND ROYALTY OWNERS AS ONE CLASS FOR PURPOSES OF IMPOSING A PRIVILEGE TAX ON THE OCCUPATION OF PRODUCING OIL AND GAS, IMPOSES AN UNEQUAL TAX BURDEN ON MEMBERS OF THE CLASS BY NOT ONLY EXEMPTING ROYALTY OWNERS FROM PAYMENT OF THE INCREASE IMPOSED BY ACT 434, BUT ALSO TAXING PRODUCERS ON THE VALUE OF PRODUCTION ATTRIBUTABLE TO SUCH ROYALTY OWNERS, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Before the challenged statute was enacted to amend parts of Alabama's oil and gas severance tax statutes, [5] the statutory scheme included royalty owners within the definition of producers who were subject to the tax and included the royalty interest in the production on which the tax was levied. A "producer" was defined by §40-20-1(8), Code of Ala. 1975, as follows:

> PRODUCER. Any person engaging or continuing in the business of oil or gas production,

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5 The challenged statute, Act 434, amended §40-20-2, Code of Ala. 1975, as well as §40-20-8. The several statutes pertaining to the severance tax are §§40-20-1 through 40-20-13.

> which, for the purpose of this article, includes the *owning*, controlling, managing, or leasing of any oil or gas property or oil or gas well, and producing in any manner any oil or gas by taking it from the soil or waters, or from beneath the soil or waters, of the state of Alabama, and *further includes receiving money or other valuable consideration as royalty or rental for oil or gas produced or because of oil or gas produced, whether produced by him or by some other person on his behalf, either by lease, contract or otherwise, and whether the royalty consists of a portion of the oil or gas produced being run to his account or a payment in money or other valuable consideration.*(emphasis added).

Section 40-20-2(b) provided that the tax was "hereby levied upon the basis of the entire production in this state, including what is known as the royalty interest." [6] There was also a clear statutory statement that the producers shall be taxed "in the proportion of their ownership at the time of severance." Ala. Code §40-20-3(a)(1975). These provisions were not changed by Act 434 and remained in force.

A tax with provisions similar to those of the Alabama statute was before this Court in the case of *Barwise v. Sheppard*, 299 U.S. 33 (1936), and was upheld as a valid tax under the fourteenth amendment. In that case, a Texas severance tax on oil production was challenged as applied to the plaintiffs, who were not actively engaged in the production of oil, but were lessors having a royalty interest. The statute in question had amended a prior law which did not tax royalty interests, and imposed an

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6 The quoted words were present in the statute before Act 434 amended §40-20-2, and they were also present in Act 434 itself.

occupation tax only on the active producer or operator of an oil well. The royalty owners in ***Barwise*** argued they could not permissibly be included within the class of those subject to a tax on the "occupation" of producing oil. The Court in ***Barwise*** held that under the fourteenth amendment, a legislature may validly declare the owners of royalty or other interests in the oil produced to be engaged in the occupation or business of producing oil. The Court further held that a tax laid on such an occupation validly encompassed all who have a direct and beneficial interest in the oil produced, whether they be owners conducting oil operations on their own lands, or lessees operating under leases from owners and sharing the oil with the latter, or owners who have leased their lands for oil operations and share the oil with the lessees. The court stated:

> While operations under the lease are carried on by the lessee and not by the lessors, they nevertheless are carried on in virtue of the lease, that is to say, under stipulations made between the lessors and the lessee. The lease shows that the parties to it are, in a very practical sense, committed to and engaged in a common venture for their mutual benefit. The lessors have put into the venture their right to explore for and to extract the oil under their lands, and the lessee has put into it various drilling and pumping appliances and much expense, labor, and time. All that has been put in is devoted to the common purpose of producing oil in which the lessors and the lessee are to have stated interests. It is this production that is taxed against the lessors and the lessee according to their respective interests.
>
> Without question the State has power to lay an excise on the production of oil. Here it is laid, admissibly we think, on those having a direct

> and beneficial interest in the oil produced and is apportioned between them according to their interests. The apportionment is reasonable, not arbitrary; and is as reasonable to the lessors as to the lessee.

Id. at 39.

The decision in *Barwise* expanded on the prior holding of this Court in *Oliver Iron Mining Co., supra,* that working interest owners were validly subject to an occupation tax on mining. Although the statute then in question excluded the royalty interest from a tax on mining production, the validity of this exclusion under the fourteenth amendment was not in question. In a later case, this Court did face the question of whether royalty interests were properly taxed along with the interests of active mine producers and answered the question in the affirmative. *Lake Superior Consolidated Iron Mines v. Lord,* 271 U.S. 577 (1926). In that case, as well as in *Barwise,* this Court recognized that royalty owners were properly included in the class of producers subject to mining occupation taxes.

When the Alabama legislature enacted Act 434, it did not substantially alter most of the provisions which uniformly treat producers and royalty owners alike as "producers" under the statute. Those same provisions were applied by the state even after Act 434 was enacted, in taxing both producers and royalty owners under the basic four percent tax rate. Act 434 exempted royalty owners only from payment of the two percent increase imposed by the Act and from no other liability. By this provision, members of the same class were taxed according to different rates, an arbitrary and unreasonable distinction with no rational basis considering the object and purposes of the tax statute. The Act also required producers to bear a tax burden measured in part by the value of production attributable to royalty interests, increasing their tax burden beyond that justified by a privilege tax the purpose of which is to lay an

equal tax burden on all producers engaged in the occupation of producing oil and gas.

The classification made by a state taxing statute "must be reasonable,[7] not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The royalty owner exemption causes the Act in question to fail this test.[8]

The statutory scheme which existed immediately before and immediately after the enactment of Act 434 shows that Act 434 constituted an arbitrary departure from the other provisions of the Alabama oil and gas severance tax statute which did not have a fair and substantial relation to the object of the legislation. The Alabama tax by its own terms is an annual privilege tax "levied on every person engaging or continuing to engage . . . in the business of producing or severing oil and gas." Ala. Act No. 434, Sec. 1(e). The definition of "producer" before and after the enactment of Act 434 included royalty

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7 The effect of the royalty owner exemption when considered in relation to the other statutory provisions, is to require the producer-taxpayer to pay the tax not only on the basis of its own production but also upon other production, namely the royalty interest owned by the exempt royalty owner. Such a result is manifestly unreasonable.

8 In upholding the royalty owner exemption, the Supreme Court of Alabama stated a "conceivable reason" to support the exemption for royalty owners, namely that the exemption "could encourage the development of new oil and gas wells." See Supreme Court of Alabama Opinion p. 12; App. A, p. 9a. This conclusion is erroneous. There was no evidence whatsoever to support the conclusion, and, in fact, the opposite is true. The exemption of royalty owners will *discourage* production because the working interest owners are the ones who decide whether to drill wells and their taxes (and consequently their production costs) will be increased on account of the exemption of royalty owners.

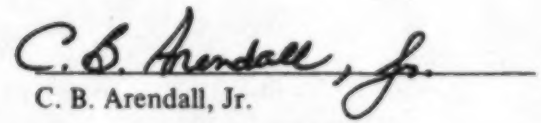
owners within the class of persons engaged in such occupation and subject to the tax. Additionally, the statute expressly stated that the tax was to be based upon the entire production, including the royalty interest, with the tax to be apportioned to each interest holder. These provisions established both the classification of producer and revealed the object of the legislation to be an equal burden of taxation on all members of the class benefiting from engaging in the privilege which was taxed. Act 434 departed dramatically from both concepts. Instead of treating different classes in different ways, which is clearly permissible under the fourteenth amendment, Act 434 arbitrarily subjected members of the same "producer" class to differing tax treatments contrary to the other provisions and object of the severance tax statutes. "The Equal Protection Clause . . . den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." ***Reed v. Reed,*** 404 U.S. 71, 75-76 (1971).

The Pass-Through Prohibition and royalty owner exemption created these arbitrary and unreasonable distinctions in the treatment of producers without any basis in fact or any legislative statement of any reason in the public interest justifying such distinctions. The Act unreasonably forces producers with a working interest to bear the tax not only on their own production but upon the royalty interest as well. While state legislatures have been granted wide latitude to create classifications in tax legislation, the latitude granted should not be so wide as to encompass such blatant and palpably unjustifiable discrimination as this. The discriminatory features of Act 434 deviate too far from the severance tax statutes approved by this Court in the past, which treat all interest holders engaged in the occupation of mining equally and impartially, for this Court now to approve this scheme.

CONCLUSION

For the reasons stated, and because the highest court in Alabama decided federal questions in conflict with this Court's decision in *Maryland v. Louisiana* and with other decisions of this Court and of federal courts of appeal, the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,



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No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

EXXON CORPORATION, GULF OIL CORPORATION AND THE LOUISIANA LAND AND EXPLORATION COMPANY,
Appellants,

v.

RALPH EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, et al.
Appellees.

On Appeal From the Supreme Court of the State of Alabama

PROOF OF SERVICE

I, LOUIS E. BRASWELL, one of the attorneys for Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2nd day of December, 1981, I served copies of the foregoing Jurisdictional Statement on all parties required to be served, as follows:

1. On appellee herein, Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, by depositing a copy in a United States post office, with first class postage

prepaid, addressed to John J. Breckenridge, his counsel of record, at 201 Administrative Building, Montgomery, Alabama 36130.

2. On all other parties to the proceeding below, by depositing copies in a United States post office, with first class postage prepaid, addressed to their respective attorneys of record, as follows:

To Rae M. Crow, Esq., Attorney for Exchange Oil and Gas Corporation, Getty Oil Company, Placid Oil Company, Terra Resources, Inc., and Union Oil Company of California,
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Appendix

APPENDIX A

July 10, 1981

THE STATE OF ALABAMA - - - -JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM - 1981

Ralph P. Eagerton, Jr.,
as Commissioner of Revenue
of the State of Alabama

v.

Exchange Oil and Gas Corporation, et al.
Appeal from Montgomery Circuit Court

79-823

BEATTY, JUSTICE.

Fourteen oil and gas producers filed similar suits challenging the constitutionality of Act No. 79-434, approved by the Alabama Legislature in its 1979 Regular Session, and seeking refunds of oil and gas severance taxes paid pursuant to the Act. The trial court held the Act to be unconstitutional. Ralph P. Eagerton, Jr., as Commissioner of Revenue, appealed. We reverse and remand.

Before the legislature enacted Act No. 79-434, the statute governing the amount of oil and gas severence tax was Code of 1975, §40-20-2. That section in its relevant part read:

> (a) There is hereby levied, to be collected hereafter, as herein provided, annual privilege taxes upon every person engaged or continuing to engage within the state of Alabama in the

business of producing or severing oil or gas as defined herein from the soil or the waters, or from beneath the soil or the waters, of the state for sale, transport, storage, profit or for use. The amount of such tax shall be measured at the rate of five percent of the gross value of said oil or gas at the point of production until October 1, 1973, at which time the rate of such tax shall decrease to four percent, which shall be the applicable rate thereafter.

(b) The tax is hereby levied upon the basis of the entire production in this state, including what is known as the royalty interest, on which production the amount of such tax shall be a lien, regardless of the place of sale or to whom sold, or by whom used, or the fact that the delivery may be made to points outside the state; and the tax shall accrue at the time such oil or gas is severed from the soil or the waters, or from beneath the soil or the waters, and in its natural, unrefined or unmanufactured condition.

Code of 1975, §40-20-8, dealt with the allocation and distribution of the taxes collected.

The caption of Act No. 434 states that its purpose is: "To amend Code of Alabama 1975, Sections 40-20-2 and 40-20-8, so as to increase the rate of tax; to provide further for the distribution of the proceeds of the tax; and to provide certain exemptions from the increased rate." Section 1(a) or Act 79-434 provides:

Code of Alabama 1975, §40-20-2, is amended to read as follows:

"§40-20-2. (a) There is hereby levied, to be collected hereafter, as herein provided, annual privilege taxes upon every person engaging or

> continuing to engage within the State of Alabama in the business of producing or severing oil or gas as defined herein, from the soil or the waters, or from beneath the soil or the waters, of the state for sale, transport, storage, profit, or for use. The amount of such tax shall be measured at the rate of six per centum of the gross value of said oil or gas at the point of production. All wells producing less than 26 barrels of oil per day shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production. All wells that come into production after the effective date of this Act shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production for a period of ten years after production begins. Ten years after production begins, such tax shall be then imposed at the rate of six per centum (6%) on such wells that go into production after the effective date of this Act. Provided, however, that said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation. . . ."

The primary issue in this appeal deals with the effect of the phrase which reads "said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation," (hereinafter the smackover provision) in Act No. 79-434.

Code of 1975, §40-21-2 had previously imposed a 4% severance tax on statewide oil and gas production. The commissioner contends that Act No. 79-434, the amendatory Act, was intended to increase that rate from 4% to 6% statewide. The appellees, however, urge that because of the inclusion of

the sentence which reads "said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation," the entire Act was intended only to impose an increase on the wells which were producing oil and gas from the smackover formation at the depth specified.

It is undisputed that the smackover formation underlies only twelve counties in Alabama and that that is an unchanging fact. It is also clear that at the time of the passage of the Act, the only production in the smackover formation from 15,000 to 15,800 feet in Alabama was in Escambia County. Thus the appellees urge that the increase from 4% to 6% was intended only to apply to those wells in the smackover formation at that depth, all of which were in Escambia County. Since the Act as so interpreted would only apply to one county, appellees contend that it is a local Act.

In *Town of Loxley v. Rosinton Water, Sewer and Fire Protection Authority, Inc.*, Ala., 376 So. 2d 705 (1979) this Court said:

> In interpreting statutes the underlying consideration, always, is to ascertain and effectuate the intent of the legislature as expressed in the statutes. *Employees' Retirement System of Alabama v. Head*, 369 So.2d 1227 (Ala. 1979). While specific language used by the legislature is subject to explanation, such language cannot be detracted from, or added to. *May v. Head*, 210 Ala. 112, 96 So. 869 (1923). Furthermore, when the language of a statute is clear and unambiguous there is no room for judicial construction. *Employees' Retirement System of Alabama v. Head*, supra. . . . The purpose of interpretation is not to improve a statute but rather to explain the express language used

in the statute. *Lewis v. Hitt*, 370 So. 2d 1369 (Ala. 1979).

The appellant contends that the language of the smackover provision, which reads, "***said additional increase*** shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation" (emphasis added), should properly be construed by reading that provision in conjunction with the sentence immediately preceding it. The preceding swntence limits the increase on wells that go into production after the effecgive date of the Act to 4% for a period of ten years and then provides that after ten years it shall be raised to 6%. By reading the two sentences together, appellant urges that the smackover provision would refer only to the increase from 4% to 6% on new wells after a ten-year moratorium and to the statewide severance tax increase from 4% to 6%. In other words, the appellant urges that the smackover provision requires that new wells will all be taxed at a rate of 4% for ten years, and then there shall be an increase to 6% on those new wells in the smackover formation at the depth specified. According to the appellant, the smackover provision was not intended to limit the entire Act so that wells in the smackover formation at that depth were the only ones to be taxed at a rate of 6%.

The manifested intent of the legislature, as stated in the Act itself, was to levy this tax upon "every person engaging or continuing to engage within the State of Alabama in the business of producing or severing oil or gas. . . ." This a clear and unambiguous statement that the legislature intended for the tax increase to apply statewide. Moreover, Act No. 79-434 specifically replaces and amends Code of 1975, §40-20-2 which imposed a 4% severance tax statewide. If this Act were interpreted as applying only to those wells in the smackover formation at the specified depth, and only in Escambia County, there would be no provision for taxing the rest of the state. Certainly that was not the intent of the legislature.

After a careful reading of the Act, we are convinced that the smackover provision should logically be read in conjunction with the preceding sentence and should only be construed as a limitation on the taxing of new wells. Although the appellees put forth various forms of extrinsic evidence, some of which was clearly inadmissible, in order to prove the intent of the legislature, the general rule is that when the intent of the legislature can be determined from the language of the statute itself, we do not need to resort to extraneous matters to determine the ligislative intent. "Courts can only learn what [the] Legislature intended by what it has said, and have no right to stray into mazes of conjecture or search for an imaginary purpose, in construing [a] statute." *Alabama Industrial Bank v. State ex rel. Avinger*, 286 Ala. 59, 237 So. 2d 108 (1970). We are thus compelled to find that the smackover provision was not intended by the legislature to be a limitation which affected the entire Act.

The trial court held that because of the inclusion of the smackover provision Act No. 79-434 was a local Act. This decision was apparently based on the authority of *Peddycoart v. City of Birmingham, Ala.*, 354 So. 2d 808 (1978) in which this Court held that if at the time legislation was adopted it applied to any political subdivision less than the whole state, it was a local Act.

Since we interpret the smackover provision as being a limitation on the taxing of new wells, and not as a limitation on the entire Act, we find that Act No. 79-434 is one which in its terms and effects applies to the whole state. Not only does the Act impose an increased severance tax on the production of oil and gas statewide, but the smackover provision itself applies statewide by giving a statewide incentive to create new wells except in the smackover formation at a depth of 15,000 to 15,800 feet. Accordingly, Act No. 79-434 is a general law.

Based on the erroneous determination that Act No. 79-434

was a local law, the trial court held that Act No. 79-434 violated Section 106 of the Alabama Constitution because it was not published or posted as required by that section for local laws, that it violated Section III of the the Alabama Constitution because Act No. 79-434 had been introduced as a general law and amended so as to be a local law on passage, and violated Section 105 of the Alabama Constitution because Act No. 79-434 was a local law which dealt with a subject covered by a general law. Since we have determined that Act No. 79-434 is a general law, there can be no conflict with any of these sections and we need not discuss these arguments in depth.

Act No. 79-434, Section 1(d) (e), reads as follows:

> Any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefore. (e) The privilege tax herein levied shall be absorded and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.

The trial court held that because of the above-quoted royalty owner exemption and pass-through prohibition, Act No. 79-434 lacked uniformity and established arbitrary classifications in violation of the equal protection and due process clause of the federal and state constitutions.

The appellees urge that there was no reasonable ground for exempting royalty owners from the increase and thus that the trial court correctly found the classification to be arbitrary.

They contend that because Code of 1975, §20-20-1(8) includes royalty owners within the definition of the term "producers," the tax is being imposed unequally within the class of producers. This, they urge, is especially true since the pass-through prohibition precludes producers from passing the tax on to the consumers.

In *Haden v. Watson*, 270 Ala. 277, 117 So. 2d 694 (1960) this Court discussed the power of the legislature to establish classifications for the purpose of license and excise taxes. There it was said:

> The legislature has the broadest range and power in establishing classifications or subclassifications for the purpose of license and excise taxes. State v. Pure Oil Co., 256 Ala. 534, 55 So. 2d 843. Further the legislature in classifying subjects for taxation is not required to state the grounds for classification. State v. Pure Oil Co., supra. . . .
>
> Furthermore particular privileges, occupations, classes or subclasses of businesses may be licensed and taxed and other privileges, occupations or businesses need not be included and can be entirely exempt therefrom. Henry v. Shevinsky, 239 Ala. 293, 195 So. 222; State v. Pure Oil Co., supra.
>
> In other words the classification of occupations and privileges for taxation is largely a matter of legislative discretion, and it will not be interfered with by the courts as being in violation of the rules of equality and uniformity unless it is palpably arbitrary and unreasonable and unless there is no conceivable state of facts which would support it. State v. Pure Oil Co., supra; Carmichael v. Southern Coal

& Coke Co., 301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A.L.R. 1327; Frazier v. State Tax Commission, 234 Ala. 353, 175 So. 402, 110 A.L.R. 1479,

In the instant case the legislature sought to exclude royalty owners from the increase in the severance tax. Admittedly royalty owners are a subclass of producers under Code of 1975, §40-20-1(8); however in *Haden, supra,* we noted that a distinction in the imposition of taxes can be made between subclassifications. Such a distinction will not be interfered with unless there is no conceivable set of facts to support it. Here it is conceivable that the exclusion of royalty owners from this increase in tax could encourage the development of new oil and gas wells. There being a conceivable reason to support the distinction, the legislative enactment should not be deemed arbitrary and should be upheld.

Similarly the trial court held the smackover provision to be an arbitrary and unconstitutional classification because the increase was limited only to the production from the depth of 15,000 to 15,800 feet. Since the legislature could have intended to encourage oil and gas production in other parts of the state and in other layers of the earth we find this to be a reasonable distinction and hold this provision was not unconstitutional for this reason either.

The trial court also held that because of the royalty owner exemption and the pass-through prohibition, Act No. 79-434 was unconstitutional in that it impaired contractual obligations. The contractual obligations in question were leases which required royalty owners to pay their share of severance taxes, and sales contracts which required the purchasers to reimburse the plaintiffs for tax increases. The United States Supreme Court faced a similar situation in *Barwise v. Sheppard*. 299 U.S. 33, 57 S. Ct. 70, 79 L. Ed. 637 (1936) where it was said:

> Plainly no stipulation in the lease can be of any avail as against the power of the State to impose the tax, prescribe who shall be under a duty to the State to pay it, and fix the time and mode of payment. And this is true even though it be assumed to be admissible for the lessors and the lessee to stipulate as to who, as between themselves, shall ultimately bear the tax. . . .

Thus it is clear that parties to a private contract cannot limit a state's ability to levy taxes. This was recognized by the Alabama Supreme Court in *McPhillips Mfg. Co. v. Curry*, 241 Ala. 366, 2 So. 2d 600 (1941) where it was said:

> The existence of an executory contract between or among two or more individuals presents no obstacle to the right or power of the State to levy or impose a tax which may adversely affect the financial interest of either or any of the parties which may have been acquired under or by reason of the mutual covenants of such parties to the contract. . . .

Thus, although one party to the contracts involved here may receive less than anticipated as a result of Act No. 79-434, such a decrease does not amount to an impairment of the contracts. The legislature must retain the authority to tax free from interference by the contracts of private persons. Act No. 79-434 does not unconstitutionally impair the contracts of the parties.

The trial court determined that Act No. 79-434 was an unconstitutional burden on interstate commerce and thus violated the United States Constitution. Specifically the trial court found that the pass-through prohibition violated Article I, Section 8, Clause 3 of the U.S. Constitution because Congress had preempted the field which the pass-through prohibition attempted to address. The trial court held that the Natural

Gas Policy Act of 1978, codified at 15 U.S.C. §§ 3301-3432, prevented the legislature from mandating that the increased severance tax could not be passed on by the producers.

The Natural Gas Policy Act established maximum lawful prices at the wellhead for all sales of natural gas. That Act in Section 3320 reads:

> [A] price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extent necessary to recover (1) state severance taxes attributable to the production of such natural gas and borne by the seiler. . .

Nowhere in that section is it stated that the oil companies are entitled to "pass-through" increases on state severance taxes. Rather, the Act merely provides that the lawful ceiling on the first sale at the wellhead may be raised if a severance tax is imposed by the states. The two Acts are aimed at entirely different purposes. In other words, although it would be perfectly permissible for the oil and gas companies to raise the price for the first sale of natural gas, subject to the limitations of the Natural Gas Policy Act, all that Act No. 79-434 requires is that the increase in severence tax mandated by that Act be borne by the producer or severer of the oil or gas. Thus the pass-through prohibition contained in Act No. 79-434 does not conflict with the Natural Gas Policy Act of 1978, and the trial court's finding to that effect is due to be reversed.

The trial court declared that Act No. 79-434 was unconstitutional because it violated Section 45 of the Alabama Constitution of 1901 which provides that "[e]ach law shall contain but one subject which shall be clearly expressed in the title. . . ."

The title to Act No. 79-434 reads as follows:

> To amend Code of Alabama 1975, Sections 40-20-2 and 40-20-8, so as to increase the rate of tax: to provide further for distribution of the proceeds of the tax; and to provide certain exemptions from the increased rate.

The trial court declared that Act No. 79-434 covered more than one subject and that the title did not clearly express the subjects of the Act. Specifically the trial court found that the title did not make any reference to the following topics:

1. The purported consumer protection and/or pricing regulation in form of the prohibition against pass through contained in Section 1(e).

2. The provision requiring the "producer of severer" to absorb and pay the tax.

3. The extent of the increase of the tax.

4. The fact that the Act imposed differing tax rates on different production.

5. That producers would be required to bear the royalty owner's share of the tax.

6. The fact that the tax is not based on ownership of the mineral interest.

7. That purchasers would be prohibited from accounting for and paying the tax in derogation of the provisions of Section 40-20-3.

The purpose of Section 45 has generally been said to be to sufficiently disclose the subject of the Act so as to apprise the legislature and the public of the matter to be legislated therein. ***Bozeman v.Conecuh County Board of Education,*** 282 Ala. 543, 213 So. 2d 388 (1968).

In ***Boswell v. State,*** 290 Ala. 349, 276 So. 2d 592 (1973) this Court quoting ***Pallentyne v. Wickersham,*** 75 Ala. 533 (1883), stated the rules governing the application of Section 45. There it was said:

> "[T]he title of a bill may be very general, and need not specify every clause in the statute. Sufficient if they are all referable, and cognate to the subject expressed. And when this subject is expressed in general terms, every thing which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is included in, and authorized by it." . . .

In this case we find that the title of the Act was sufficient to meet the requirements of Section 45. The seven provisions which the trial court found not to be included in the title are provisions which are necessary to make the enactment complete or at least are provisions which result as a complement of the thought contained in the general expression of the title. Therefore we hold that Act No. 79-434 does meet the requirements of Section 45.

The trial court held that Act No. 79-434 was "so vague, uncertain, indefinite, ambiguous, and conflicting with and repugnant to other existing provisions of other statutes that it cannot be enforced on any rational basis and, therefore, must be stricken." While we recognize that courts have the power to declare legislative enactments inoperative and void for indefiniteness or uncertainty, that power should only be

exercised when the statute is so incomplete, or irreconcilably conflicting, or so vague and indefinite, that it cannot be executed, and the court is unable to determine with any reasonable degree of certainty what the legislature intended. ***Jansen v. State ex rel. Downing***, 273 Ala. 166, 137 So. 47 (1962). We do not find this Act to be so defective.

Moreover, we note that in construing statutes courts must presume that statutes are constitutional and should not hold them unconstitutional unless they are convinced beyond a reasonable doubt of their unconstitutionality. ***Alabama Dairy Commission v. Food Giant, Inc.***, Ala., 357 So. 2d 139 (1978).

In ***Brittain v. Weatherly***, 281 Ala. 683, 207 So. 2d 667 (1968), quoting ***State ex rel. Montgomery v. Merrill***, 218 Ala. 149, 117 So. 473 (1928), this Court said:

> "It is a well-recognized rule that it is the duty of the court to uphold a law when it is fairly susceptible of two interpretations, one of which maintains its constitutionality and the other strikes it down, though the adoption of the former be the less natural. . . ."

For this reason we find that the statute is not void for indefiniteness or uncertainty.

Since we have determined that the provisions of Act No. 79-434 are constitutional, we do not need to address the question of whether the severability clause should have been used by the trial court to save this Act or portions thereof.

On the same day the trial court rendered the final order in this case, it granted partial summary judgment in favor of plaintiffs Warrior Drilling and Engineering Company, Inc., Pruet Production Company and Anderman Operating Company

under the "26 barrel provision" of Act No. 79-434, which provides that "All wells producing less than 26 barrels of oil per day shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production." The trial judge specifically found that the exemption in the Act refers to both oil or gas production. The trial court's order granting the partial summary judgments stated:

> Since the language of the exemption from the face of the Act is clear and unequivocal, and each of these Plaintiffs have proven that ***only one or two of their wells at most produce more than 26 barrels*** of oil per day, said Plaintiffs Warrior Drilling and Engineering Co., Inc., Pruet Production Company and Anderman Operating Company are entitled to judgment. [Emphasis added.]

While we agree that the exemption in the Act refers to all wells producing either oil or gas, the trial court's order granting partial summary judgment is illogical. Since the trial court recognizes that one or two of the plaintiffs' wells do produce more than 26 barrels of oil, it was improper to hold that Act No. 79-434 did not apply to those plaintiffs. For that reason the motion for partial summary judgment was improperly granted.

For the above reasons we hold that Act No. 79-434 was valid in its entirety and the order of the trial court must be and is hereby reversed and remanded.

REVERSED AND REMANDED.
All the Justices concur.

APPENDIX B

IN THE CIRCUIT COURT OF MONTGOMERY MONTGOMERY COUNTY, ALABAMA

EXCHANGE OIL AND GAS CORPORATION,
Plaintiff,

VS.

RALPH EAGERTON, Commissioner of Revenue of the State of Alabama,
Defendant.

CV-79-1284-H
and

CV-79-1362-H	CV-80-168-H	CV-80-564-H
CV-79-1363-H	CV-80-121-H	CV-80-565-H
CV-79-1397-H	CV-80-421-H	CV-80-566-H
CV-79-1529-H	CV-80-863-H	CV-80-567-H
CV-79-1338-H	CV-80-351-H	CV-80-568-H
CV-79-1583-H	CV-80-714-H	CV-80-569-H
CV-79-1622-H	CV-80-509-H	CV-80-517-H
CV-79-1508-H	CV-80-074-H	CV-80-518-H
CV-79-1509-H	CV-80-224-H	CV-80-519-H
CV-79-1510-H	CV-80-225-H	CV-80-520-H
CV-80-006-H	CV-80-226-H	CV-80-780-H
CV-80-165-H	CV-80-227-H	CV-80-781-H
CV-80-166-H	CV-80-228-H	CV-80-782-H
CV-80-167-H	CV-80-229-H	CV-80-783-H

OPINION AND ORDER

This matter came on to be heard on May 26, and 17, 1980,

in open Court. The evidence was adduced by testimony of the parties and witnesses, by stipulations of fact by depositions and exhibits. The case has been fully briefed and argued by counsel. The Court notes that most of the material and relevant facts are not in dispute, many of which have been stipulated between the parties. While timely objections were made by counsel as to the admissibility of certain evidence, the Court has considered only that evidence which is material and relevant. After having considered the pleadings, briefs, evidence, and arguments of the parties, it is the judgment and opinion of the Court that the relief prayed for by the Plaintiffs should be granted, that Act 434 of the Regular Session of the Alabama Legislature of 1979 be stricken as null, void and unconstitutional in all respects and of no further force or effect, and that the Plaintiffs herein are entitled to a refund of taxes paid by them pursuant to the provisions of Act 434. These cases are somewhat complicated and involved by the fact that 42 separate and independent cases involving fourteen Plaintiffs were consolidated for discovery and trial. While each of the Plaintiffs sought a refund of taxes paid under Act 434, and while there were common issues presented by all Plaintiffs, certain contentions of the parties Plaintiffs were different from others in certain of the cases and there were different party Defendants in some cases. The Defendant, Ralph Eagerton, Commissioner of Revenue, was a common Defendant in all cases.

I. INTRODUCTION

These 42 consolidated cases seek to have the Court construe Act 434, 1979 Session Alabama Legislature, declare it unconsitutional and order a refund to the various Plaintiffs of the 2% increase in severance taxes paid by them under protest to the State of Alabama on their production of oil and gas within the State of Alabama. [1]

1/ Some Plaintiffs have also brought their suits against Co-Defendants with whom they have contractual arrangements pertaining to the payment of, or reimbursement for, severance taxes.

Act 434 was signed into law by the Governor on July 19, 1979, and became effective pursuant to its terms on September 1, 1979. The Act attempts to impose an increase in severance taxes of 2% (from 4% to 6%) on certain oil and gas production by amendment of Section 40-20-2, *Code of Alabama* 1975.

The contentions of Plaintiffs focus primarily upon four provisions of Act 434. One is the "Smackover Proviso" which appears as the last sentence of that portion of the Act that increases the tax rate from 4% to 6%. The Smackover Proviso reads as follows:

> Provided, however, that said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation.

The Smackover formation is an ancient geological formation which underlies twelve counties in southwest Alabama. It extends from Mississippi and other westward states across southwest Alabama into northwest Florida. The only county in Alabama having production from the Smackover formation from depths between 15, 000 and 15,800 feet is Escambia County. [2] This was true on September 1, 1979, when Act 434 purportedly became effective; it is also true now. Plaintiffs' contentions also focus on the "Royalty Owner Exemption" of the Act, which reads as follows:

> Any person who is a royalty owner shall be exempt from the payment of any increase in

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2/ This was the information supplied to Representative Brooks Hines by the State Oil and Gas Board which prompted the depth limitation set forth in the Smackover Proviso. If well depths are measured from mean sea level, one well in the Chatom Field, of Wahington County, produces from the Smackover between 15,742 and 15,857 feet.

> taxes herein levied and shall not be liable therefor.

Another such provision is the "Pass-Through Prohibition," which reads as follows:

> The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusiveiy by the producer or severer of oil or gas.

The fourth provision is the "Twenty-Six Barrel Provision" which reads as follows:

> All wells producing less than 26 barrels of oil per day shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production.

Generally stated, Plaintiffs contend the following:

(1) The Smackover Proviso causes Act 434 to be a "local" law; the Act, therefore, violates several provisions of the Alabama Constitution pertaining to "local" laws.

(2) Act 434 violates Section 45 of the Alabama Constitution because it contains more than one subject and the subjects are not clearly expressed in the title to the Act.

(3) Act 434 lacks uniformity and extablishes arbitrary classifications in violation of the equal protection and due process requirements of the Federal and Alabama Constitutions.

(4) Act 434 is void because it is so uncertain, ambiguous and conflicting as to be incapable of rational interpretation and equitable enforcement.

(5) Act 434 is unconstitutional under the Federal and the Alabama Constitutions because it impairs contractual obligations.

(6) Even if Act 434 is valid, it does not obligate some of Plaintiffs to pay the tax increase because (a) by virtue of the Smackover Proviso the tax is levied only on oil and gas production from this formation between the depths of 15,000 and 15,800 feet, and (b) by virtue of the Twenty-Six Barrel Exemption, by which wells producing less than twenty-six barrels of oil per day, are exempted from the tax increase. Thus, the production of various Plaintiffs is not subject to the tax increase.

Defendant contends that the Act increases the severance tax statewide and that the Smackover Proviso applies only to new wells between 15,000 and 15,800 feet in the Smackover formation. Defendant also contends that the other provisions of the Act and the Act itself will pass all constitutional tests.

Therefore, the parties' contentions are diametrically opposite. A cursory examination of the Act reveals several apparent conflicts and repugnancies that are apparent to the face of the Act. These include but are not limited to: the apparent impairment of contracts resulting from the new Royalty Owner Exemption and the new Pass-Through Prohibition; the taxation of royalty interest and the exemption of royalty owners within the Act itself; the apparent conflict with existing Code provisions such as Sections 40-20-1 and 40-20-3; the questionable different treatment of royalty owners with the "old" tax and the "new" tax; and the confusion between the parties relative to the meaning and effect of the Smackover Proviso.

The Court's first impression is that the Smackover Proviso clearly limits the increase from 4% to 6% to only those wells lying within the indicated depth interval and which are located in and producing from the Smackover formation. The insistence by the State to the contrary, and the contrary interpretation by the State, leads this Court to look into the history of the Act since the Court's function is to construe the Act according to the Legislature's intent. From the history and other evidence set out in detail below, it is without any reasonable dispute that the Legislature intended (1) to tax Smackover wells in Escambia County by an additional 2%; (2) to exempt the royalty owners of those Smackover wells from the increased tax burden and (3) to impose the tax increase solely on the producers.

II. FACTS

A. *Plaintiffs' Oil and Gas Production and Contracts*

Each of the Plaintiffs is engaged in exploring and prospecting for oil and gas within the State of Alabama. [3] The Plaintiffs have successfully completed wells producing oil or gas in paying quantities within the State of Alabama.

3/ Plaintiffs Exchange Oil and Gas Corporation, Getty Oil Company, and Union Oil Company of California have successfully completed and operate natural gas wells located primarily in Mobile County, Alabama. Plaintiffs Terra Resources, Inc., Warrior Drilling & Engineering Co., Inc., Pruet Production Company, Anderman Operating Company, and Petroleum Corporation of Texas, operate natural gas wells located primarily in Fayette and Lamar Counties, Alabama. In addition, Plaintiff Pruet Production Company operates oil wells located in Choctaw County, Alabama. Plaintiffs Exxon Corporation, The Louisiana Land and Exploration Company and Gulf Oil Corporation have their production primarily in Escambia County, Alabama. Plaintiffs Placid Oil Company and Midroc Operating Company operate oil wells located primarily in Clarke and Choctaw Counties, Alabama. Plaintiff, Citmoco Services, Inc., operates oil located in the Citronelle Field in Mobile County, Alabama.

Only the Plaintiffs Gulf, Exxon and LL&E, have production in the Smackover formation in the interval between 15,000 and 15,88 feet. All of the other Plaintiffs' production is in other formations and/or at other depths.

Each of the Plaintiffs' respective wells is located within what is known as a drilling and producing "unit," the size and configuration of which is established under Alabama law by the State Oil and Gas Board of Alabama, Section 9-17-1, et seq. *Code of Alabama* 1975. Plaintiffs do not own all of the production attributable to the unit wells located in each of their producing units. The units generally consist of several separate tracts of land which have been leased directly to the Plaintiffs or assigned to the Plaintiffs by assignees and successors of the original lessee. Production of oil or gas from the unit is allocated to the several owners based upon their pro rata ownership within the unit boundaries established by the Oil and Gas Board. The landowners are entitled to a certain percentage of the unit's total production known as royalty which varies from lease to lease, as established by negotiations between the parties, and may vary from 12-½% to as high as 54%, of the oil or gas produced. The owner of this royalty has the right under the lease contract to elect to take his royalty "in kind." Severance taxes under the terms of the leases are to be borne pro rata by both the lessor and the lessee.

Additionally, there are tracts covered by leases within any given production unit which the Plaintiffs do not own, but which are owned by other lessees or their assigns. The Plaintiffs, as operators of the well, are authorized to sell and do sell the oil or gas to third party purchasers and distribute the proceeds of the sale pro rata to each owner in the unit, including the royalty owners. Thus, the Plaintiffs, as unit operators of the wells, handle the production and sales proceeds from production for and on behalf of all owners in the unit, including landowners and royalty owners (which includes royalty sold by landowners to others who do not own title to the

mineral fee and/or royalty carved out of the working interests of leases and reserved by the assignors of other lessees) and other lessees.

The sales contracts of the various Plaintiffs entered into prior to the effective date of the Act all provide, to one extent or another, that severance taxes or increases thereof shall be borne by the purchaser.

In addition to the Smackover Proviso set forth above, the Plaintiffs also contest the validity and constitutionality of the Royalty Owner Exemption and the Pass-Through Prohibition.

In addition to the legal and constitutional objections and contentions made on behalf of all of the Plaintiffs, some of the Plaintiffs (Terra Resources, Inc., Petroleum Corporation of Texas, Warrior Drilling and Engineering Co., Inc., Anderman Operating Company and Pruet Production Company) claim, in addition, that the tax does not apply to most of their production, because most of the wells operated by them produce less than 26 barrels of oil per day. Their claim to this exemption is made under and pursuant to the following provision of the Act:

> ***All wells*** producing less than ***26 barrels of oil*** per day shall be taxed at the rate of 4% of the gross value of said ***oil or gas*** at the point of production. (Emphasis supplied.)

Each of these five Plaintiffs has proven that most of their wells produce less than 26 barrels of oil per day and are entitled to judgment in any event. [4]

4/ The Act does not purport to tax most of the production of the Plaintiffs, Pruet, Anderman, Terra, Warrior, and Petroleum Corporation of Texas because most of their wells produce less than 26 barrels of oil per day. Although Terra does have two wells which produce more than

B. *Legislative History*

The Act was initially introduced in the House of Representatives by Representative Hines of Escambia County, Alabama. as a bill of statewide application, increasing severance taxes from 4% to 6% on all production within the State. The bill was thereafter referred to the House Ways and Means Committee. Just prior to consideration of the bill as H. B. 148 (subsequently enacted as Act 434) by the Ways and Means Committee, the sponsor, Mr. Hines,amended the bill by adding the Smackover Proviso, the Royalty Owner Exemption and the Pass-Through Prohibition.

The testimony and evidence presented at trial show that Representative Hines appeared before the House Ways and Means Committee on or about June 6, 1979, presented his amended bill and represented to the Committed at that time that the bill had application only to Escambia County. Accordingly, he asked the Committee for "local courtesy," meaning that the other members of the Committee would be expected to vote favorably for the measure, since it did not

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4/ Continued
26 barrels per day and which thus are not exempted. The language of this exemption from the face of the Act clearly exempts "all" wells which produce less than 26 barrels of oil per day. This exemption from the face of the Act is clear and unequivocal. This exemption by its terms applies to "all" wells regardless of whether they produce oil or gas. One of the earlier versions of the bill presented by Representative Hines, prepared by the Alabama Reference Service, did restrict the exemption operations to "oil" wells by insertion of the word oil after the word "all" so that the sentence commenced "all oil wells"; but the word oil was omitted from the language exemption on passage of the bill. See the trial testimony of Louis Green, Director of the Legislative Reference Service and Plaintiffs' Exhibit 27. On May 21, 1980, the Court entered judgments in favor of Petroleum Corporation of Texas and Terra Resources on the 26 barrel matter. This judgment was based on the uncontradicted evidence filed in support of the respective motions for summary judgment. The trial evidence, therefore, further supports said judgments.

affect their counties. During the debate and presentation before the House Ways and Means Committee, Representative Hines stated that H.B. 148, as amended, was applicable only to oil and gas production in the subsurface interval between 15,000 and 15,800 feet in the Smackover formation. He further stated that the only production in the State at these depths was located in his own County, Escambia County, and for these reasons, he was, therefore, asking for local courtesy. Mr. Hines, during debate before the House Ways and Means Committee, was specifically asked by a member of that Committee, Representative Sandusky, whether the bill applied only to Escambia County to which he replied in the affirmative. Later, on July 12, 1979, when the bill was presented on the floor of the House of Representatives, Mr. Hines made similar representations to the members of the House.

In addition, throughout its passage through the legislative process, the bill was treated as a local bill and was taken up out of order on the calendar for this reason. When the bill reached the Senate, Representative Hines again made representations before the Senate Finance and Taxation Committee of a similar nature, representing the bill as only taxing production in the stated interval. Similar representations were also made on the floor of the Senate where the bill was amended to include Sction 3, the severability clause. Finally, Mr. Victor Vernon, Assistant Director of the Legislative Fiscal Office, prepared an official memo which indicates that the Secretary of the Department of Revenue was apprised of the Act's local and restricted application as affecting only Escambia County and he advised Mr. Vernon that the revenue estimates should be changed to "reflect the Escambia County interpretation."

Significantly, after the bill was amended to include the Smackover Proviso, the Legislative Fiscal Office reduced its estimate of revenues to be generated by the Act from $5.4 million to $1.7 million. The reduced estimate was based on the oil and gas produced only in Escambia County, Whereas the

earlier fiscal note had been based and calculated on statewide production. These Fiscal Notes were physically attached to the amended bill as required by the rules of both the House and the Senate. [5]

After the Bill was enacted, the Department of Revenue, in two memoranda released by it to the Alabama Petroleum Council, determined that it would interpret the Act as a statewide Act.

III. INTERPRETATION OF SMACKOVER PROVISO

A. General Interpretation

In light of the opposing contentions advanced by Plaintiffs and Defendant, it is necessary preliminarily to interpret the scope of the Smackover Proviso. That provision, the final sentence in the first paragraph of the statute (which increases the tax rate from 4% to 6%, reads as follows:

> Provided, however, that said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation.

Plaintiffs contend that the Smackover Proviso applies to, and

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5/ The Legislative Fiscal Office is a creature of statute being authorized under the provisions of Section 29-5-1 et seq. *Code of Alabama* 1975. These statutes specifically provide that the Fiscal Office will furnish information as to the revenues to be derived from proposed legislation to the Committee on Ways and Means of the House and the Committee on Finance and Taxation of the Senate. Section 29-5-7, *Code of Alabama* 1975. Under House and Senate Rules members of the Fiscal Office have floor privileges and under House Rule 63 and Senate Rule 77 a copy of the Fiscal Notes must be attached to each revenue measure.

limits the imposition of, the basic tax increase (from 4% to 6%). Defendant contends that the Smackover Proviso does not apply to the basic tax increase but instead modifies only the immediately preceding sentence which states that "(t) en years after production begins, such tax shall then be imposed at the rate of six per centum (6%) on such wells that go into production after the effective date of this act."

For several reasons it is clear that the Smackover Proviso applies to the basic tax increase from 4% to 6% and that Plaintiffs are correct in their interpretation.

The word "increase" appears at three places in the Act, and it is appropriate that this word have the same meaning in all three places. One place is the Smackover Proviso. Another place is the title of the Act which states that one of the Act's purposes is "to increase the rate of tax." As used in the title, the word "increase" is a clear reference to the basic increase in tax rate from 4% to 6%. The third place where the word "increase" appears is the Royalty Owner Exemption which reads as follows:

> Any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefor.

In that provision the word "increase" also refers to the basic increase in tax rate from 4% to 6%. In fact, the Department of Revenue has so interpreted the provision. A memorandum from the Legal Division of the Department of Revenue was introduced for the purpose of showing the Department's interpretation. The memorandum states the following concerning the effect of the Royalty Owner Exemption:

> However, since the royalty-interest Owner's share is exempt from "the payment of any

increase in taxes" levied in Act 434, the producer may not deduct from the royalty-interest owner's portion any amount which would represent the 2% increase in taxes levied by Act 434.

Additionally, the Smackover Proviso appears as a completely independent sentence, not a mere clause appended to the immediately preceding sentence. This indicates that the Smackover Proviso was intended to have much broader application than merely to the immediately preceding sentence. Moreover, the Smackover Proviso was not a part of the original bill but was inserted later by amendment. Because it was inserted by amendment both as a completely independent sentence and at the very end of the paragraph in which it appears, it is clear that the sentence was intended to apply to, and restrict, the basic increase in tax rate imposed by the paragraph. [6] Also, because both the Smackover Proviso and the Royalty Owner Exemption were inserted by amendment at the same time, the word "increase" appearing in both provisions should have the same meaning. Provisos which follow after a statute's enacting clause are to be given a rational interpretation in harmony with the general purpose and intent of the statute, with a view to carrying into effect the purpose of the law. *Chandler v. Waugh*, 290 Ala. 70, 274 So. 2d 46 (1973). The appropriate office of a proviso is to restrain and modify the enacting clause and preceding matters and where it is manifest that the intent was that it apply to other portions, it will be construed to restrain or qualify even other and separate sections and paragraphs of the Act. *Wartensleben v. Haithcock*, 80 Ala. 565, 1 So. 38 (1887); and *Cooper v. State*, 28 Ala. App. 422, 187 So. 500 (1939). Such is the case here, the location of the proviso, as underscored by the legislative history, restricts

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6/ As stated in *State v. Crenshaw*, 287 Ala. 139, 249 So. 2d 622 (1971), the "last [provision] in order of arrangement controls."

the tax increase to wells at the stated depths in the stated formation and, therefore, does not levy a tax on the production of the Plaintiffs, Union, Getty, Exchange, Placid, Terra, Citmoco, Pruett, Warrior, Anderman, Midroc, and Petroleum Corporation of Texas; but does, if constitutional, purport to tax the production of Exxon, LL&E and Gulf.

If there is any merit at all to Defendant's contention, the statute at best would be ambiguous when viewed from Defendant's standpoint. Such an ambiguity would bring into play the familiar rule of interpretation that "construction of it must be against taxing power and in favor of taxpayer." ***Butler & Kannamer Wholesale Company v. State,*** 293 Ala. 216, 301 So. 2d 178 (1974); ***State v. Alabama Leasing Company,*** 336 So. 2d 1353 (Ala. 1976).

Even without considering the Act's legislative history it is clear that the Smackover Proviso applies to the basic tax rate increase from 4% to 6%, and the Court so holds. The legislative history, if taken into account, unmistakably confirms the correctness of this holding.

The legislative history as shown by the testimony and evidence at trial make the conclusions reached in this respect crystal clear. This Court has not considered any evidence relating to the "motive" or "reasons" of the Legislature or any conclusions of legislators regarding their "motives" or "opinions" as condemned in ***James v. Todd,*** 267 Ala. 495, 103 So. 2d 19 (1957). The actual testimony of the bill's sponsor, his explanation and representations with regard to the bill's scope, both before the Committees and on the floor of both houses, is both relevant and competent evidence. Courts generally have looked to statements of the sponsor of the bill, the committee member in charge of the bill and to the draftsman's understanding of the bill's nature and effect in determining legislative intent. Sutherland, ***Statutory Construction,*** §4814, §4815 and §4810 (4th ed. 1973). In the course of

deliberations on any bill, legislators naturally look to its sponsor, as well as to the representative of the Committed in charge of it, as one who is expected to be particularly well informed about its purpose, meaning and intended effect; and in recognition of this reality of legislative practice, courts give weight and consideration to statements made by such parties. 2A *Sutherland*, §§4814, 4815. In this same connection Sutherland further states:

> . . . if the draftsman's views were clearly and prominently communicated to the legislature when the bill was being considered for enactment, so as to give reason to believe that the legislators' understanding of the bill would have been influenced by the draftsman's communicated views and so as to be visible to others who are concerned to understand the meaning of the act, there is reason to invoke an exception to the general rule and attach weight to the draftsman's views. *Sutherland, supra*, at §4812, p. 215.

The courts have consistently followed this general rule.[7]

7/ *Alabama C. Bd. of H. ex rel. Baxley v. Chambers County*, 335 So. 2d 653 (1971) (Court will look less at "letter or words of statute" than at the . . . reason and spirit of the law" which is the "pole star" of statutory construction.); *Harrison v. Northern Trust Co.*, 317 U.S. 418 (1942), (Court looks to legislative history for explanation of act's meaning "no matter how clear the words may appear on 'superficial examination.' "); *U. S. v. American Trucking Assoc.*, 310 U.S. 532 (1939), (Court has duty to look to legislative purpose even where wording of statutes are plain and clear since there is no "rule of law" forbidding interpretation in accordance with the legislative purpose); *Galvan v. Press*, 347 U.S. 522 (1954), (Oral statement and written memorandum of the sponsor described as a "weighty gloss" on the legislation); *NLRB v. Fruit and Vegetable Packers & Warehousemen*, 377 U.S. 58 1964) and *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) ("[I] t is the spon-

The Supreme Court of Alabama has held in a number of cases that legislative history is relevant and admissible. Thus in ***State Docks Commission v. State ex rel. Jones,*** 227 Ala. 521, 150 So. 537 (1933), the Supreme Court specifically referred to a number of aids to ascertain the legislative intent, including the legislative journals, the fact that the Standing Committed on Finance and Taxation had reported the bill to the Senate, the fact that ***a substitute bill had been referred to*** and reported on by the Standing Committee on Appropriations; the fact that the Standing Committee on Enrolled Bills had given a specific report and a message from the House to the Senate. To the same effect see also, ***Southern Express Co. v. I. Brickman & Co.,*** 187 Ala. 637, 65 So. 954 (1914); ***American Bakeries Co. v. City of Opelika,*** 229 Ala. 388, 157 So. 206 (1934); ***Houston County v. Martin,*** 232 Ala. 511, 169 So. 13 (1936); and ***State v. T. R. Miller Mill Co.,*** 272 Ala. 135, 130 So. 2d 185 (1961). Likewise in ***Morris v. State,*** 271 Ala. 290, 122 So. 2d 914 (1960), the Supreme Court said:

> In construing statutes, it is our *duty* to examine the legislative history in order to ascertain the true intent of the law-making body. 271 Ala. at 292, 122 So. 2d at 915 (Emphasis supplied).

7/ **Continued**

sors to which the court looks when the meaning of the statutory words is in doubt.") (Oral and written statements of the sponsor); *Chicago and NWR Co. v. United Trnsp. Union,* 402 U.S. 570 (1971), (Oral statements of the proponents declared to be "entitled to great weight" in construction of an act.); *National Woodwork Mfrs. Asso. v. NLRB,* 386 U.S. 612 (1967), (Silence of the sponsors on certain points was looked to in construing the act.); *Silver v. Brown,* 48 Cal. Rptr. 609, 409 P. 2d 689 (1966), (Affidavits of drafting employees admitted in evidence where recorded floor discussions and debated note available.); 143 Conn. 280, 121 A. 2d 630 (1956), (Oral statements of House member in charge of bill declared to be "strong indication of the legislative intent."); *Brennan v. Corning Glass Works,* 480 F.2d 1254 (3d Cir. 1973), (Sponsor's statements admitted in evidence and declared to be "entitled to great weight.")

Even more significant is the decision in the Supreme Court in *Morgan v. Board of School Commissioner of Mobile County*, 248 Ala. 22, 26 So. 2d 108 (1946), where the court held as follows:

> In addition to the historical background shown by the foregoing enactments, *the words of the members of the Constitutional Convention of 1901 uttered on the floor of the convention* are helpful in arriving at a correct construction of Section 270 of the Constitution of 1901. 248 Ala. at 25, 26 So. 2d at 110. (Emphasis supplied)

In the *Morgan* case, the court then went on to examine and rely upon statements made by members of the convention in rendering its determination and quoted in extenso the exact language used by certain members during floor debate. Of similar import is the case of *Ex parte Southern Bell Tele. & Tele. Co.*, 267 Ala. 139, 143 99 So. 2d 118, 121 (1957), where the court noted that "[a]lthough the debates of the constitutional convention are not binding on this court, they are highly persuasive. . . ." Thus, the fact that the portions of the statute under consideration which are in contention, were offered by amendment within the Committee on Ways and Means of the House of Representatives, the fact that its sponsor on the floor of the House and in committee repeatedly explained and represented the bill as affecting only the production in the stated interval and geological formation, the fact that the Alabama Fiscal Office in performance of its statutory duty projected an estimated revenues on a local basis (i. e., Escambia County production of oil and gas) and attached that Fiscal Note to the bill itself as required by the rules of the House and Senate, and the other facts considered by the Court are all relevant legislative history to establish with overwhelming clarity the intention of the legislature and the intent of the bill itself. It is a bill which purports only to tax production in

the stated interval, and no other area in the state on the effective date of the Act or at the present time is producing from those intervals except Excambia County.

IV. ACT 434 IS A "LOCAL" LAW AND, A SUCH, VIOLATES THREE PROVISIONS OF THE ALABAMA CONSTITUTION

A. *Smackover Proviso Makes Act 434 a "Local" Law*

Having found that the increase of 2% attempted to be levied by Act 434 taxes and applies only to the production of oil and gas now located in Escambia County with no effect or impact upon production elsewhere in the State, the question arises as to the validity and constitutionality of a taxing statute which taxes the production of only one county or, at the best, production from a portion of one subsurface stratum or formation. By definition, a "local" law is one which applies to a portion of the state, but not the entire state. A law which applies only to one county, or only to several counties, is a "local" law. In light of this definition, the Smackover Proviso clearly makes the Act a "local" law.

Section 110, Article IV of the Alabama Constitution, as amended by Amendment No. 375, defines a "local" law as being one which is not a private law or a "general" law, and defines a "general" law as being one which applies "to the whole state" (or, although not relevant here, to one or more municipalities).

Alabama cases establish that a "local" law need not apply to just one county or one political subdivision, but that the law will be "local" even if the affected area encompasses portions of several political subdivisions, so long as the entire state is not affected. *State ex rel. Attorney General v. Sayre*, 142 Ala. 641, 39 So. 240 (1904); *Opinion of the Justices*, 278 Ala. 98, 176 So. 2d 29 (1965); *State v. Lash*, 350 So. 2d 748 (Ala. Cr. App. 1977).

The Smackover Proviso restricts the scope of the tax increase by providing that "said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 in the smackover formation." There are two different but related reasons why the Smackover Proviso causes Act 434 to be "local." The first is that as a matter of unchanging geological fact the Smackover formation underlies only twelve counties in Alabama; hence, it is inconceivable that Act 434 can apply to the entire State because fifty-five of the counties are not even underlain by the Smackover formation. [8] A Separate but related reason why Act 434 is "local" is that, when the Act became effective, only Escambia County had production from the Smackover formation at 15,000 to 15,800 feet.[9] While it is conceivably true that one of the other southwest Alabama counties could at some future date have production from the Smackover fromation at 15,000 to 15,800 feet (although this has not yet occurred), the Supreme Court of Alabama has made it clear that the significant time for determining whether an act is local is the ***effective date*** of the Act. In ***Peddycoart v. City of Birmingham***, 354 So. 2d 808 (Ala. 1978), the Court stated that Section 110 of the Alabama Constitution (defining "local" laws) is applicable "when it [the bill] becomes law," and that "[i]f, when it becomes law it applies only to a subdivision of the state, it is a local law." 354 So. 2d at 814.

The Smackover Proviso's "local" scope is underscored by its "double classification" feature. Two criteria - - depth and formation - - are embodied in the phrase "wells from between 15,000 and 15,800 feet in the Smackover formation." The

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8/ Of the twelve counties underlain by the Smackover formation, only six of these have the Smackover formation at a depth of 15,000 to 15,800.

9/ This is the data furnished by the State Oil and Gas Board.

separateness of the criteria of depth and formation is demonstrated by the fact that there are a number of wells in the Smackover formation at shallower and deeper depths and the fact that at 15,000 to 15,800 feet there is production from a formation other than the Smackover (namely the Norphlet formation).

In a number of decisions, the Supreme Court of Alabama has condemned "double classification" as simply being a "designation" of a particular locality to which the statute would apply. The following language appears in *Ward v. State ex rel. Lea*, 224 Ala. 242, 139 So. 416 (1932);

> We have condemned double classification which tended to confine the operation of the law to one particular locality . . . for such a law results in a designation rather than classification.

224 Ala. at 244, 139 So. at 417. In *State ex rel. Saltsman v. Weakley*, 153 Ala. 648, 45 So. 175 (1907), the Court considered a statute which pertained to "cities of 35,000 population, or more, in counties of 125,000 or more population." 153 Ala. at 650, 45 So. at 175. The criteria concerning both cities and counties were utilized. The Court stated that "[w]e find no case in the books upholding, as a general law, an Act with a double or reclassification, such as the one in question." The Court held that the statute was "local" and that it violated Section 106 of the Alabama Constitution because no notice was published or posted as required for "local" laws. Other relevant Alabama cases in accord with *Ward* and *Weakley* are *McCoy v. Jefferson County*, 232 Ala. 651, 169 So. 304 (1936); *Henry v. Wilson*, 224 Ala. 261, 139 So. 259 (1932); and *State ex rel Conrad v. Board of Road Commissioners*, 231 Ala. 18, 163 So. 345 (1935).

Consequently, the Smackover Proviso unquestionably causes

Act 434 to be a "local" act subject to several requirements imposed by the Alabama Constitution concerning the enactment of local legislation.

B. *Section 106 - - Publication Requirement*

Section 106 of Article IV of the Alabama Constitution provides that "(n) o special, private, or local Act shall be passed on any subject. . . unless notice of the intention to apply therefor shall have been published" according to the requirements of Section 106, An Act which is "local" and which was passed without compliance with Section 106 is unconstitutional. *Opinion of the Justices*, 356 So. 2d 118 (Ala. 1978); *Couch v. Rodgers*, 253 Ala. 533, 45 So. 2d 699 (1950).

It is undisputed that notice of the intention to apply for the legislation resulting in Act 434 was not published or posted in accordance with requirements of Section 106 of the Alabama Constitution. For this reason Act 434 is void.

C. *Section 111 - - Change on Passage to Become "Local" Law*

Section 111 if Article IV of the Alabama Constitution provides that "(n) o bill introduced as a general law in either house of the legislature shall be so amended on its passage as to become a special, private or local law."

As the legislative history reveals, the original bill imposed a tax increase in respect of statewide oil and gas production. By virtue of the Smackover Proviso which was inserted when the bill was amended, the Act imposed the tax increase only in respect of production from 15,000 to 15,800 feet in the Smackover formation.

Accordingly, the bill was "introduced as a general bill" and was "so amended on its passage as to become a . . . local

law" in violation of Section 111. It is, therefore, unconstitutional. See *Opinion of the Justices*, 284 Ala. 626, 627 So. 2d 396, 397 (1969).

D. *Section 105 -- Subject "provided for by a General Law"*

By virtue of Section 105 of Article IV of the Alabama Constitution, no "local" law "shall be enacted in any case which is provided for by a general law. . . ."

In *Peddycoart v. City of Birmingham*, 354 S – . 2d 808 (Ala. 1978), the Court held that Section 105 was violation because the statute in question was a "local" law which covered a subject that was "provided for by a general law." The "local" law applied only to Birmingham by virtue of a population classification; it conferred on the city a type of immunity in tort. General statutes already dealt with the matter of municipal liability in tort. In addressing the question whether the subject was "provided for by a general law," the Court repudiated three different ways in which the Court in a number of prior cases had gotten around Section 105. Then the Court concluded that the presence of a general law is "*primary*, and means that a local law cannot be passed upon that subject." 354 So. 2d at 813. (emphasis original) While the Court made decision prospective rather than retroactive, it indicated clearly that general law on the subject of "municipal liability in tort" precluded, by virtue of Section 105, a local law conferring immunity on a particular city.

Since *Peddycoart* the Court has considered Section 105's application to "local" law in several cases. In *Opinion of the Justices*, 354 So. 2d 148 (Ala. 1978), the Court advised the legislature that a proposed bill purporting to exempt Choctaw County from the statewide requirement that county engineers be qualified land surveyors was unconstitutional, holding that the bill would be a "local" law operating "on a subject already subsumed by a general law and [would] violated Section 105."

357 So. 2d at 149. In *ABC Bonding Co. v. Montgomery County Surety Commission*, 372 So. 2d 4 (Ala. 1979), the Court held that a statute revising bail practices in the Fifteenth Judicial Circuit was unconstitutional under Section 105 because a statute of statewide application covered many of the same points. In *Yancey & Yancey Construction Co. v. DeKalb County Commission*, 361 So. 2d 4 (Ala. 1978), the Court considered a contention that the local law violated Section 105 because it permitted a coal severance tax for DeKalb County when general statutes already levied a coal severance tax statewide. Because the Act in *Yancey* was passed *before Peddycoart*, the Court pointed out that the holding in *Peddycoart* "was expressly limited to legislation enacted after the date of that opinion" and stated that, therefore, the rules which were applied prior to *Peddycoart* must govern. 361 So. 2s at 5. Applying the pre-*Peddycoart* rules, the Court concluded that the local severance tax statute was not proscribed by Section 105. However, it is clear that the result would have been different if the local Act had been enacted after the decision in *Peddycoart*. [10]

As a "local" law, Act 434 clearly violates Section 105 because an oil and gas severance tax was already "provided for by a general law." Existing statutes already imposed a statewide oil and gas severance tax. *Peddycoart* clearly indicated that this statewide severance tax was a "general law" which precluded a "local" law increasing the tax in a portion of the state.

10/ This conclusion is supported by *Peddycoart's* repudiation of *Standard Oil Co. of Kentucky v. Limestone County*, 220 Ala. 231, 124 So. 523 (1929), the pre-*Peddycoart* decision on which the Court in *Yancey & Yancey Construction Co.* relied.

V. ACT 434 LACKS UNIFORMITY AND ESTABLISHES ARBITRARY CLASSIFICATIONS IN VIOLATION OF THE EQUAL PROTECTION AND DUE PROCESS REQUIREMENTS OF THE FEDERAL AND STATE CONSTITUTIONS

As indicated above, the Plaintiffs have completed and operate wells producing oil or gas in commercial quantities in drilling and producing units established by the State Oil and Gas Board of Alabama. These duly established drilling and producing units consist of various tracts and interests not all of which are covered by leases owned by or assigned to the various Plaintiffs. Under the terms of the leases owned by the respective Plaintiffs, severance taxes are to be borne on a pro rata basis by both the lessee and lessor/royalty owner.

The Royalty Owner Exemption is contained in paragraph 1(d) of the Act and provides as follows:

> Any person who is a royalty *owner* shall be exempt from the *payment of any increase in taxes herein levied and shall not be liable therefor*. (Emphasis supplied).

The Defendant has construed and is enforcing the Act so that the 2% increase cannot be deducted from the royalty owner's share.[11]

11/ Plaintiffs' Exhibit 19, page 2, memo of counsel to the Defendant dated September 12, 1979, outlining interpretation of this exemption together with the Pass-Through Prohibition contained in paragraph 1 (e) of the Act. See also, the Plaintiffs' Exhibit 18, a memo from counsel for the Defendant dated August 16, 1979 stating in part as follows: ". . .it is my opinion that in the case where an interest in an oil and gas well is owned by a royalty owner, the oil and gas severance tax will be paid on the oil or gas severed by the producer." Subsequently, this opinion and interpretation was modified (see Plaintiffs' Exhibit 19) where

Section 1(e) of Act 434 contains the "Pass-Through Prohibition" and provides that:

> The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this section that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.

The Defendant has construed "the intent of the Legislature" with respect to Section 1(e) so as to prohibit the severance tax from being passed on to any party.[12] Thus, the combined effect and impact of the Royalty Owner Exemption of paragraph 1(d) and the Pass-Through Prohibition contained in

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11/ Continued
the Defendant interpreted the Act as follows: "However, since the royalty-interest owner's share is exempt from the 'payment of any increase in taxes' levied in Act 434, the producer may not deduct from the royalty-interest owner's portion any amount which would represent the 2% increase in taxes levied by Act 434. . . . Thus, it is my opinion of Act 434 that the producer is liable for the entire 6% of oil and gas severance tax levied. . . .In addition, the royalty-interest owner would be exempt from the payment as a producer of the increase in oil or gas severance tax of 2%. However, . . . the royalty-interest owner may be liable for the payment of a protion of 4% of the severance tax."

12/ See Plaintiffs' Exhibit 19 where counsel to the Defendant construes the Act as follows: ". . .Act 434 clearly manifests the intent of the Legislature that the oil and gas severance tax *henceforth* shall be paid by the producer and *shall not be passed on to anyone.* Therefore, it is my opinion that the producer is now liable for the entire oil and gas severance tax."

paragraph 1(e) is that the "producer" is required to bear and absorb a portion of the tax attributable to production of the mineral owner and, purportedly, cannot charge or pass on any portion of the tax to any party.

The statutory scheme created by Section 40-20-1, et seq. *Code of Alabama* 1975 clearly imposes a tax upon producers in direct proportion to their ownership. It is by its terms a tax on mineral ownership of producing mineral interests, whether the interest is a leasehold (working interest), royalty or overriding royalty interest, which is in lieu of ad valorem taxes. §40-20-12, *Code of Alabama* 1975.

A "producer" is defined by the terms of Section 40-20-1(8) as follows:

> (8) PRODUCER. Any person engaging or continuing in the business of oil or gas production, which, ***for the purpose of this article,*** includes the ***owning,*** controlling, managing, or leasing of controlling, managing, or leasing of any oil or gas property or oil or gas well, and producing in any manner any oil or gas by taking it from the soil or waters, or from beneath the soil or waters, of the state of Alabama, and further includes ***receiving money*** or other valuable consideration a royalty or rental for oil or gas produced or because of oil or gas produced, ***whether produced by him or by some other person on his behalf,*** either by lease, contract or otherwise, ***and whether the royalty consists of a portion of the oil or gas produced*** being run to his account or a payment in money or other valuable consideration. (Emphasis supplied).

The fact that a royalty owner is considered and defined in this section to be a "producer" is given credence by the Defendant, at least in part, since the Defendant interprets this section in conjunction with Act 434 to require the royalty owner "as a producer" to bear its fair share of the 4% tax, but not its fair share of the 2% increase; and thus under the Defendant's interpretation, the royalty owner is considered partly as a producer and partly as a non-producer.[13]

Furthermore, Section 40-20-2(b) specifically provides that royalty is included within the tax base or classification in the following language:

> The tax is hereby levied upon the basis of the ***entire production*** in this state, ***including what is known as the royalty*** interest. . . . (Emphasis supplied)

Section 40-20-3, ***Code of Alabama*** 1975 imposes the tax on all producers in proportion to their ownership in the following language:

> (a) The privilege tax hereby imposed is levied upon the producers of such oil or gas ***in the proportion of their ownership at the time of severance,*** but, except as otherwise herein

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13/ See Plaintiffs' Exhibit 19 wherein counsel for the Defendant quotes Section 40-20-1(8) at length and makes the following comment with respect thereto: "As can be seen from the above quoted definition of the term 'producer' a royalty-interest owner would be considered a 'producer' within the definition of the term as used in the oil and gas severance tax act. . . . [I]t is my opinion that while the producer is liable for the entire severance tax at the rate of 6%, the producer may deduct from the royalty-interest owner's share an amount that would reflect the payment of the severance tax by the royalty-interest owner up to 4%."

provided, the tax shall be paid by *the person in charge of production operations, who is hereby authorized, empowered and required to deduct from any amount due to producers of such production at the time of severance the proportionate amount of the tax* herein levied before making payments to such producers.

. . .

(b) When any person in charge of production operations shall *sell* the oil or gas produced by him, *the purchaser shall account for the tax.*

(c) When any person in charge of production operations shall use or dispose of the oil or gas for fuel or any other purpose, he shall *withhold* the tax imposed by this article; and, *if he is required to pay other interest holders,* he is hereby authorized, empowered and required *to deduct from any amounts due them the amount of tax levied and due under the provisions of this article before making payment to them.* (Emphasis supplied).

The provisions of this section clearly show that the tax is based and levied upon *mineral ownership* and is to be paid proportionately by the respective "owners" which is, in all respects, and by any yardstick, a fair, reasonable, equal and equitable classification for imposition of the tax. [14] In addition, Section 40-20-3(b) expressly provides that purchasers shall account to the State in instances where the producer has contracted to sell oil and/or gas.

14/ The Defendant has recognized ownership as the proper basis of the tax. See Plaintiffs' Exhibit 19 wherein counsel to the Defendant states in part: "The royalty interest *owner* may be liable for payment of a portion of the 4% of the severance tax."

Finally, Section 40-20-12, *Code of Alabama* 1975 exempts all mineral rights in producing properties and all oil gas under the ground on producing property from ad valorem taxes. Said section provides in pertinent part as follows:

> (a) All oil or gas produced, all leases in production, including mineral rights in producing properties, and all oil or gas under the ground on producing properties within the state of Alabama ***shall be exempt from all*** ad valorem taxes.
>
> . . .
>
> (b) For the purpose of this article, the area of a lease or leases, including all oil and gas rights considered to be in production, . . . shall include an oil or gas drilling unit as established by the state oil and gas board of Alabama and shall be exempt from ad valorem taxation because of production from any one well. (Emphasis supplied)

The provisions of this Section clearly indicate that the severance tax is a substitute for and in lieu of ad valorem taxes based on ownership. Because of the fortuitous event of achieving actual production of oil and gas the owner's tax burden on his mineral interest as a landowner is automatically shifted to the "producer" who has brought in the well. Since the landowner would be liable for taxes on his minerals in the absence of production or if the well is a dry hole, it is, to say the least, arbitrary to exempt the landowner from his land taxes when and only when that mineral interest fortuitously produces oil or gas.

The foregoing statutory scheme, in conjunction with the Smackover Proviso, clearly indicates the intention to tax the entire production from wells in the stated depth interval in the

stated geological formation from any given unit, with the tax to be borne by "producers," including royalty owners, in proportion to their ownership. The Royalty Owner Exemption and Pass-Through Prohibition conflict with and are repugnant to this statutory design and result in unequal and discriminatory taxation. The attempt made in Act 434 to exempt royalty from the class of "producers" and require the operator/producer of the well to bear this additional burden is without precedent under the laws of any other oil producing state. Every other producing state taxes royalty proportionately on its share of its own production. [15] Neither has any other state ever attempted to preclude a producer of oil or gas from "passing through" any part of its overhead such as severance taxes.

The Royalty Owner Exemption exempts one share of a well's production from taxation while taxing the remaining owners' share of production. The Pass-Through Prohibition takes the process one step further and attempts to impose payment of the royalty owners' taxes on the share of production of producer without regard to the royalty owners' ownership in production from the same wells. [16] Since royalty is

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15/ Kuntz, *Law of Oil and Gas*, Vol. 6.

16/ One kind of royalty is merely the landowner's share of production, free of expenses of production, as created under an oil, gas and mineral lease. Further, royalties include royalty owned by parties other than a landowner or overriding royalty cut out of the lessee's share of production. The royalty under oil and gas leases is a certain fraction of production and is payable in kind or payable in money. Although royalty is not subject to cost of production, it is subject to cost incurred after production, e. g., production or severance taxes, cost of treatment of the product, pipeline costs or transportation costs to market. William and Meyers, *Manual of Oil and Gas Terms* (4th ed. 1976). See also *Simson v. Langholf*, 33 Colo. 208, 293 P.2d 302 (1956); *Longino v. Machen*, 217 Ark. 641, 232 SW. 2d 826 (1950); *Hinkle v. Gauntt*, 201 Okla. 432, 206 P.2d 1001 (1949); *State National Bank of Corpus Christi v.*

entitled to, in many cases, a considerable proportion of the production free and clear of drilling and development costs, the working interest owners (i.e., the parties taking the risk of drilling the well) is taxed unequally and unfairly since the classification of taxpayer (i.e., all owners of interests in production from a well except royalty owners) is discriminatory, unreasonable, arbitrary, capricious, and unsupported by any reasonable or rational basis. There is no rational basis for requiring a producer to absorb and pay the taxes of landowner/royalty owners who own interests in production form the unit well. There likewise is no rational basis for imposing on that producer the entire tax burden by requiring that the producer shoulder this burden in deference to interestate pipeline purchasers/carriers. These provisions of the Act deny the Plaintiffs equal protection of the laws and manifestly impair and abrogate their contracts wherein their purchasers have agreed to pay and/or absorb the tax.

The 14th Amendment of the Constitution of the United States provides in pertinent part as follows:

> . . . nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.

16/ Continued
Morgan, 135 Tex. 509, 143 SW.2d 757 (1940).

The cases have recognized that the lessor and lessee under an Oil, gas and mineral lease are obligated to each pay their proportionate share of severance and other taxes levied upon production. *Gulf Refining Co. v. Stone*, 197 Miss. 713, 21 So. 2d 19 (1945); *Canadian River Gas Co. v. Bivins*, 137 Tex. 347, 153 SW. 2d 432 (1941); *Sartor v. United Gas Pub. Ser. Co.*, 186 La. 555, 173 So. 103 (1937). Thus, in *Barwise v. Sheppard*, 299 U. S. 33 (1936), the Supreme Court of the United States upheld a state statute that imposed the tax on royalty owners' production as well as on the production of the working interest owners. The Court noted that royalty owners/lessors and working interest owner/lessees are "engaged in a common venture for their mutual benefit" and have "a common purpose of producing." 299 U. S. at 39.

The equal protection clause first was interpreted in 1873 in the *Slaughter-House* cases, 16 Wall. 36, 21 L. Ed. 394 (1873). In the case of *Missouri v. Lewis (Bowman v. Lewis)*, 101 U.S. 22, 22, 31, 25 L. Ed. 989, 992 (1879), the Supreme Court said:

> It [equal protection] means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

Sections 1, 6 and 22 of the Alabama Constitution of 1901 combine to guarantee equal protection of the laws. *Black v. Pike County Commission*, 360 So. 2d 303 (Ala 1978); *City of Hueytown v. Jiffy Check Co. of Alabama.*, 342 So. 2d 761 (Ala. 1977).

There is no doubt that the guarantee of the equal protection clause applies to the exercise by a State of the power of taxation. Consequently, the taxing power of the state is limited where it seeks to impose upon members of a selected class a burden which is not shared by other members of the particular class. *Hartford S. B. I. & Inx. Co. v. Harrison*, 301 U. S. 459 (1937); *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527 (1931); *McCarthy v. Jones*, 449 F. Supp. 480 (S. D. Ala. 1978); *Weissinger v. Boswell*, 330 F. Supp. 615 (M. D. Ala. 1971). In this regard, the Supreme Court of the United States stated as follows in *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32 (1928):

> . . . the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, . . ., and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. 277 U.S. at 37

In *Coleman*, the Court, in striking down a statute imposing a tax on the recordation of mortgages but exempting mortgages executed to building and loan associations from the application of the tax liability, made the following statement concerning classifications:

> . . .[T] he classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' . . . This is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, . . .'' 277 U.S. at 38.

The Alabama cases are uniform in striking down taxing ordinances and statutes where one segment of the general class sought to be taxed is exempted from taxation without any rational reason. Decisions of the Supreme Court of Alabama are particularly relevant to the situation at hand, and, by analogy, demonstrate the arbitrariness and capriciousness of the Royalty Owner Exemption and Pass-Through Prohibition.

In *Alabama Consolidated Coal & Iron Co. v. Herzberg*, 177 Ala. 248, 59 So. 305 (1912), the Court held a tax statute unconstitutional because the tax was "not . . . imposed upon the business, or upon all engaged in a similar business, but [was] based solely upon the manner in which a party may conduct the business." 177 Ala. at 250. The statute taxed persons conducting "a commissary at which their employees trade on checks, orders or other devise. . . ." In *City of Mobile v. La Clede Hotel Company*, 221 Ala. 531, 129 So. 477 (1930), the Court held a tax ordinance to be arbitrary and capricious, and, therefore, invalid where it attempted to tax all hotels but

exempted hotels of 15 rooms as well as hotels of 30 to 35 rooms. In this connection, the Court said as follows:

> But to sustain the ordinance there must be uniformity of the tax burden upon those in the same class, there must be no fanciful or capricious classification. . . [t] his ordinance offends this well-recognized principle. Though diclosing a general purpose to tax all hotels by classification as above outlined, yet there is discrimination in that hotels of fifteen (15) rooms, and those of thrity (30) to thirty-five (35) rooms are not taxed. They are omitted from the schedule. . . . We can, of course, conceive of no substantial basis for such exemption classification, and none is here suggested. It must therefore be condemned as arbitrary and capricious, and thus invalidate the ordinance. 221 Ala. at 532.

Of similar import is the decision in ***Woco Pep. Co. of Montgomery v. City of Montgomery,*** 213 Ala. 452, 165 So. 214 (1925) where the Court held a taxing ordinance to be invalid because it was arbitrary and lacked "legal equality." In that case the ordinance sought to tax parties engaged in the selling of motor fuels but purported to exempt local dealers although those purchasing from a non-resident dealer were taxed. More recently, in ***City of Birmingham v. Brimingham Business College,*** 256 Ala. 551, 56 So. 2d 111 (1951), the Supreme Court struck down an ordinance which imposed license charges upon a "business College" but not upon other schools which were conducted for profit but taught other types of subjects. The Court concluded the ordinance violated the Fourteenth Amendment, with the following language:

> We do not think it is a proper classification for license charges within the meaning of the

> Constitution to put schools conducted for profit and privately owned in different classes with respect to each other solely on account of a difference in the subjects taught in them, respectively. We think the business of conducting a private school for profit, if it is made the subjcet of a license tax, should include all such businesses, unless there is a status which supports a different exercise of the policy power and, if not so included, there is a discrimination within the equal protection clause of the Fourteenth Amendment.

A similar approach has been adopted in *State v. Murphy*, 45 Ala. App. 637, 235 So. 2d 888 (1970).

The case of *Al Means, Inc. v. City of Montgomery*, 268 Ala. 31, 39, 104 So. 2d 816 (1958), provides further guidance concerning the validity of classifications. There the Court said:

> It is essential that the classification itself be reasonable and not arbitrary, and be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation or considerations of policy, and that there be uniformity within the class.

In the context of Act 434, there can be no "material and substantial distinction" or reasonably related difference which justifies exempting the royalty share of oil and gas production from a well, which is free of risk and drilling cost, and at the same time taxing the share in production of working interest owners which bear the cost of production at least to the point of production. There is even less material and substantial distinction to justify the attempt in Section 1(e) of Act 434 to require the producing party to absorb and bear the entire tax.

There is absolutely no difference or distinction in the oil or gas emanating from the same well, in the same unit, which would in any way rationally dictate that one share of that production would be free of tax, with that tax to be absorbed by other parties engaged in the joint venture of drilling the well. The joint venture between the parties is that the landowner contributes and leases his minerals. The working interest owners contribute their money and take the risk that the well will not be a dry hole.

When Act 434 attempts to exempt royalty owners, which exemption is further compounded by the Pass-Through Prohibition preventing the producer from charging the increased tax burden to the purchaser, the legal mandate requiring proportionate taxation is violated. The "producer" is required to pay a tax on the royalty owner's share of the production attributable to the royalty owner's ownership of the mineral fee and is restricted from passing on the unequal tax burden. The burden of the tax is, of course, magnified and progressively escalated depending upon the precentage of production to which the landowner is entitled. The evidence shows that some leases have royalty interest of as high as 54% and it is, to say the least, an irrational basis and an arbitrary classification to tax production in this manner. The lack of uniformity in this connection was discussed in *Ohio Oil Co. v. Wright*, 386 Ill. 206, 53 NE. 2d 966 (1944) where the Court said:

> The legislature, however, regarded the production of oil as including all the oil, not only by prescribing a tax upon the entire ownership, but by declaring the tax to be on 'all oil . . . produced in this State.' ***The operators are, of course, in fact producing all this oil, but do not own all of it. When we must exclude royalty the test of ownership fails in uniformity,*** for one operator may produce $1,000 worth of oil and own seven-eights 7/8ths) of it, another produce

> a like amount and, by reason of overriding royalties own six-eights (6/8ths) of its, and another under an oil-payment contract, own none of it but have an exclusive right to oil in another tract not yet drilled. Under these diverse conditions the ownership test would exact, respectively, per $1,000 value of production, $26.25 from one, $22.50 from another, and nothing from the third, yet all would produce the same amount of oil in value. ***Thus the measure of the tax is not uniform in application to the member of the class engaged in the tax occupation of producing oil,*** 53 NE. 2d at 973 (Emphasis supplied).

It is, therefore, clear that the attempt to exempt royalty and at the same time require that the "severer" (I. r., the persons in charge of production, i. e., who are operators) bear and absorb all of a tax which is the legal equivalent of ad valorem taxes based on ownership, is arbitrary and capricious because it lacks uniformity of classification of those to be taxed. It is unequal and arbitrary to exempt one share of production and at the same time tax the remainder of the production from any given well or unit.

The foregoing authorities likewise condemn the classification of wells producing between 15,000 and 15,800 feet in the Smackover formation by virtue of the Smackover Proviso and the imposition of additional taxation on production from them. There is no way that the State can "demonstrate . . .that the classification is neither capricious nor arbitrary but rests upon some reasonable consideration of difference or policy." See *Weissinger v. Boswell,* 330 F. Supp. 615 at 623 (M.D. Ala. 1971). The classification established in the Smackover Proviso is comparable to other classifications which have been held arbitrary and unconstitutional, such as the "business college" tax classification in *Birmingham Business College, supra,* the tax

classification for hotels with 15 rooms and those with 30 rooms in *La Clede Hotel Co., supra*, the tax classifications in *Woco Pep* and *Alabama Consolidated, supra*, and the geographical tax classifications in *Weissinger, supra*, and *McCarthy v. Jones*, 449 F. Supp. 480 (S. D. Ala. 1978).

The evidence is undisputed that there is no rational basis for singling out wells producing from between 15,00 and 15,800 feet in the Smackover formation and subjecting such wells to discriminatory taxation. The deeper the well, generally the greater the drilling and completion costs, pressure and temperature. Act 434 treats differently wells producing from the Smackover formation and wells producing from other formations, even if the production is from the same depth (as is the case with respect to the Norphlet formation while wells of the Flomation Field in Escambia County). Act 434 treats differently wells producing from the Smackover formation at the 15,000 to 15,800 feet depth and wells producing from the same formation at greater depths (up to over 18,500) or at lesser depths (of about 10,000 feet). There is no difference geologically or otherwise in the characteristics of the wells, the formation(s), or the production to justify the Smackover Proviso. The Defendant made no effort to prove otherwise.

For the foregoing reasons, I find that the Royalty Owner exemption, the Pass-Through Prohibition and the Smackover Proviso separately and severally violate the Equal Protection Clause of the United States Constitution and the corresponding provisions of the Alabama Constitution. Therefore, Act 434 is unconstitutional and invalid.

VI. ACT 434 IS UNCONSTITUTIONAL BECAUSE IT IMPAIRS CONTRACTUAL OBLIGATIONS

The Royalty Owner Exemption and Pass-Through Prohibition are invalid and must be stricken on a second ground because they each violate both the federal and state constitutions

which expressly prohibit the State from "impairing the obligations of the contracts." Article 1, Section 10, Constitution of the United States; Article 1, Section 22, Alabama Constitution of 1901. Plaintiffs have leases which require under their terms that the severance taxes be paid pro rata by the landowner, and these leases antedate the enactment of Act 434. In addition, the Plaintiffs have sales contracts entered into prior to the effective date of Act 434 which specifically allow and require that the severance taxes are to be paid and/or reimbursed by the pipeline purchaser. The Royalty Owner Exemption purports to excuse the landowner/royalty owners from payment of their proportionate share of the increase in severance taxes, while the Pass-Through Prohibition provides that the tax must be borne and absorbed by the producer or severer of the oil or gas.

Article 1, Section 10 of the United States Constitution provides as follows:

> No state. . . shall. . . pass any law impairing the obligation of contracts.

Similarly, Section 22, Alabama Constitution of 1901, provides in relevant part as follows:

> That no . . .law impairing the obligations of contracts, . . . shall be passed by the legislature;
> . . .

The Supreme Court of Alabama long ago declared its opposition to governmental interference with private contracts under Article 1, Section 10 of the United States Constitution and in corresponding provisions of the State Constitution. In ***Edward v. Williamson***, 70 Ala. 145, 151, 153 (1881), the Court said as follows:

> The plain purpose of these constitutional barriers,

> we think, was to preserve the sacred principle of the inviolability of contracts against that legislative interference which the history of governments has shown to be so imminent, in view of the frequent engendering or popular prejudice, and the consequent fluctuations of popular opinion. . . . [T]he prohibition [in the constitution] has no reference to *the degree* of impairment. The largest and the least are alike forbidden. (Emphasis original).

More recent cases have continued to affirm this principle of law and the Supreme Court of Alabama, in *White v. Associated Industries of Alabama, Inc.*, 373 So. 2d 616 (Ala. 1979), relied upon Section 22 of the Alabama Constitution of 1901 to strike down a statute requiring private employers to pay their employees for military leave up to 20 days per year for National Guard or Reserve duty in violation of their employment contracts. In this connection the Court said:

> It is impermissible for the legislature as a means to accomplish a legitimate end - - continue public protection by encouraging participation in the Guard or Reserves - - to enact a statute impairing the obligation of employment contracts. The means are not reasonably adapted to the beneficial end, thus, the statute if in violation of constitutional provisions forbidding impairment of contracts. 373 So. 2d at 620.

The federal cases are in accord. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U. S. 1 (1977). See also *Fleeman v. Case*, 342 So 2d 815 (Fla. 1976); *Allen v. Axford*, 285 Ala. 251, 231 So. 2d 122 (1969); *Cole Pond Fork Oil and Gas Co.*, 35 SE. 2d 25 (W. Va. App. 1945).

The law is clear and the facts dictate that the Royalty Owner Exemption and Pass-Through Prohibition impair the pre-existing contracts of these Plaintiffs. Thus, on two grounds, equal protection and impairment of contract, the Royalty Owner Exemption and Pass-Through Prohibition must be stricken and held unconstitutional.

VII. ACT 434 VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

The Pass-Through Prohibition contained in Section 1(e) of Act 434 is invalid on a third ground because it violated the Commerce Clause of the United States Constitution. Article 1. Sectio 8, Clause 3 of the U. S. Constitution grants Congress the power to regulate commerce among the several states. This provision, commonly known as the Commerce Clause, reserves to the federal government the power to regulate interestate commerce and prohibits the states from directly interfering with it or attempting to regulate it. In *International Textbook Co. v. Pigg*, 217 U.S. 91, 112 (1910), the Supreme Court stated as follows:

> It is the established doctrine of this court that a State may not, *in any form or under any guise*, directly burden the prosecution of interstate business. (Emphasis supplied)

See also *Grandin Farmers' Co-op Elevator Co. v. Langer*, 5F. Supp. 425 (D. C. N. D. 1934), *aff'd Langer v. Grandin Farmers' Co-op Elevator Co.*, 292 U.S. 605 (1934).

Related to the powers of Congress under the Commerce Clause are the provisions of Article VI of the United States Constitution which provides in pertinent part that:

> This Constitution, and the laws of the United

> States which shall be made in pursuance thereof, . . . shall be the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

In recognition of the authority of Congress under the Commerce Clause and the Supremacy Clause, the Supreme Court has frequently held that where Congress has adopted a comprehensive plan for regulating a particular aspect of interstate commerce, no power is left in the states to regulate that phase of interstate commerce in view of the all-embracing federal plan. ***Castle v. Hayes Freight Lines, Inc.***, 348 U.S. 61 (1954). This is particularly true where the state regulation conflicts with the federal plan of regulation. ***Burbank v. Lockheed Air Terminal, Inc.***, 411 U.S. 624 (1973).

On November 9, 1978, the Congress of the United States enacted the Natural Gas Policy Act of 1978, 15 U.S.C. §3301-3432 (Supp. 1979), establishing maximum lawful prices at the wellhead for all sales of natural gas, regardless of whether or not such sales are made in interstate or intrastate commerce. All sales of natural gas from wells within the State of Ala. bama became subject to the NGPA on December1, 1978, the effective date of the Act. This Act provides in pertinent part as follows:

> . . .[A] price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this subtitle if such first sale price exceeds the maximum lawful price to the extent necessary to recover (1) State severance taxes attributable to the production of such natural gas and borne by the seller, . . .

The Act defines "state severance tax" for the purposes of the

Act as:

> any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas. . . .

These provisions unequivocally indicate that Plaintiffs, pursuant to their contract, are entitled to "pass through" increases in severance taxes. Thus, the Federal Government has preempted the field of cost and pricing of natural gas and precludes the State of Alabama from legislating in this field. Therefore, the Pass-Through Prohibition is unconstitutional and is void.

VIII. ACT 434 VIOLATES SECTION 45 OF THE ALABAMA CONSTITUTION

Act 434 also violates Section 45 of the Alabama Constitution of 1901 which provides in pertinent part as follows:

> "Each law shall contain but one subject which shall be clearly expressed in its Title. . . ."

The title to Act 434 reads as follows:

> "To amend Code of Alabama 1975, Sections 40-20-2 and 40-20-8, so as to increase the rate of Tax; to provide further for distribution of the proceeds of the tax; and to provide certain exemptions from the increased rate."

From what has been said above, it is obvious that title to Act 434 covers more than one subject and that the title does not "clearly express" the subjects of the Act. The title makes no reference to any of the following matters:

1. The purported consumer protection and/or pricing

regulation in form of the prohibition against pass through contained in Section 1(e).

2. The provision requiring the "producer or severer" to absorb and pay the tax.

3. The extent of the increase of the tax.

4. The fact that the Act imposed differing tax rates on different production.

5. That producers would be required to bear the royalty owner's share of the tax.

6. The fact that the tax is not based on ownership of the mineral interest.

7. That purchasers would be prohibited from accounting for and paying the tax in derogation of the provisions of Section 40-20-3.

The provisions of Section 45 of the Alabama Constitution serve much the same purpose as does admission of legislative history, i. e., to prevent deception of the Legislature and to intelligently inform the members of the legislature of the full and true subject matter of the proposed legislation. ***Clutts v. Jefferson County Board of Zoning Adjustment,*** 282 Ala. 204, 210, So. 2d 679 (1968); ***Bagby Elevator and Electric Company v. McBride,*** 292 Ala. 191, 291 So. 2d 306 (1974); ***Alabama Education Association v. Board of Trustees of the University of Alabama,*** 374 So. 2d 258 (Ala. 1979).

The title to Act 434 manifestly gives no "warning or notice"

with regard to the specific items mentioned above and particularly to the consumer pass through prohibition. The Act deals with several different subjects and the evidence admitted shows that neither the explanation of the sponsor, nor the title to the Act, apprised the legislators of all of the subject matter of the bill. Therefore, the Act must be stricken on this ground also.

IX. ACT 434 IS VOID FOR AMBIGUITY AND IS INCAPABLE OF RATIONAL ENFORCEMENT

The Court finds Act 434 is so vague, uncertain, indefinite, ambiguous, and conflicting with and repugant to other existing provisions of other statutes that it cannot be enforced on any rational basis and, therefore, must be stricken. The Act is vague, uncertain and conflicting with other statutory provisions in the following particulars:

(1) Section 40-20-1 (8) *Code of Alabama* 1975 expressly defines a "producer" as including a royalty owner, but Act 434, by implication, exempts royalty owners from the definition of a "producer" for certain purposes.

(2) Section 40-20-3 provides that the tax will be imposed in proportion to ownership. However, Act 434 contains an inconsistent and repugnant provision purporting to exempt royalty owners. Thus, one section of the law taxes the royalty interest while another purports to exempt royalty owner. The conflict is irreconcilable.

(3) Section 40-20-2 (b) levies the tax "upon the basis of the entire production in this state including what is known as the royalty interest." As has been noted, the tax is levied upon producers who are defined to include royalty owners. yet Act 434 purports to exempt royalty owners. Again, the conflict is more than apparent.

(4) Pass-Through Prohibition prohibits pass through of the tax to "consumers" but consumers are not defined by the terms of the Act. In the next breath, the Act requires in mandatory language the producer to bear "exclusively" the tax "herein levied." Does this mean that the producer may pass the tax through to a non-consumer as the first portion of paragraph 1 (e) of the Act would imply, or does it by requiring him to "exclusively" bear this burden, prohibit him from passing through the tax to a party who neither uses nor consumes the product? This conflict is likewise irreconcilable.

(5) The provisions of paragraph 40-20-3 (b) require the *purchaser* to account for the tax. However, Act 434 in conflict therewith as has been pointed out, states that it must be borne exclusively by the producer. Accordingly, one provision requires the purchaser to account and another provision expressly prohibits transferring the burden of passing on the cost "either directly or indirectly."

(6) Section 40-20-3 (a) provides that the tax will be levied "in the proportion of their ownership at the time of severance," but the Pass-Through Prohibition in conflict therewith says it "will be borne exclusively by the producer." Again, the conflict is irreconcilable.

(7) The Royalty Owner Exemption provides that "any person who is a royalty owner shall be exempt. . . and shall not be liable therefor. Applied literally, any royalty owner (i. e., any person) is exempt even though he might also own a working interest.

(8) The Defendant has interpreted Act 434 in connection with the use of the word "increase" in the Smackover Proviso to apply only to the new well exemption immediately preceding it. On the other hand, Defendant has interpreted the word

"increase" in the Royalty Owner Exemption to apply in any case, not just those instances wherein a royalty owner would own an interest in a "new well." The fact that the Defendant has interpreted the word "increase" in these two provisions in differing manners indicates clearly that the act is conflicting, vague, uncertain and ambiguous.

(9) In the Smackover Proviso reference to depth "betweem 15,000 and 15,800 feet," there is no specification of whether the depth is to be measured from mean sea level, or the land surface, or the Kelly bushing, or the derrick floor, If the starting point is any one of the last three (as is the situation under certain Oil and Gas Board records), then hills and other surface variations could cause two nearby wells to be treated differently even though they produce from the same sub-sea depth in the same formation - - an irrational result. Yet the Act wholly fails to prescribe a uniform starting point and leaves the question of the proper starting point open to speculation.

Clearly, the Act is so indefinite, uncertain and ambiguous as to render the entire Act unenforceable. In *Opinion by the Justices*, 249 Ala. 88, 30 So. 2d 14 (1947), the Supreme Court, in striking down an Act authorizing governing bodies of state and local government to contribute to premiums on group life insurance on officers and employees as ambiguous, set forth the rule prevailing in this state as follows:

> "It is a well recognized rule of law that in the enactment of statutes reasonable precision is required. Indeed, one of the prime requisites of any statute is certainty, and legislative enactment may be declared by the courts to be inoperative and void for uncertainty in meaning. This power of the Court may be exercised where the statute is so incomplete, so conflicting or so vague or indefinite that the statute

> cannot be executed and the court is unable by the application of law and accepted rules of construction to determine what the legislature intended by any reasonable degree of certainty."

Since the statute did not indicate what was meant by the term "governing body of every state department," nor did it specify what amounts of insurance would be purchased or the percentage of the premiums to be paid out of public funds, the Court applied the above quoted principle of law, in striking down the statute. See Also, ***Plant v. R. L. Reid, Inc.***, 294 Ala. 155, 313 So. 2d 518 (1975); ***Dewrell v. Kearley***, 250 Ala. 18, 32 So. 2d 812 (1947); ***Standard Oil Company v. State***, 178 Ala. 400, 59 So. 667 (1912).

X. ENTIRE ACT IS INVALID

Act 434 is unconstitutional and void for each of the separate reasons hereinabove discussed. The entire Act is invalid even though it contains a severability clause. The presence of a severability clause does not save an act or portions thereof if the remaining portions are not in accord with the legislative intent. In ***Ward v. State ex rel Lea***, 224 Ala. 242, 139 So. 416 (1932), the Court stated the following:

> "Nothwithstanding such saving clause, as to whether or not the valid portion of a statute is immune from the invalidating effect the law gives the inseparable blending of the bad with the good, is still a judicial question."

After analysis the Court concluded that there was "such an intimate relationship existing between all parts of the act as to create an 'inseparable blending of the bad with the good,' so that to strike [certain provisions] and leave the remainder would cause results not contemplated or intended by the lawmakers." The Court stated that therefore the whole Act

must be invalidated. Additionally, the Court stated the following:

> "But the real and vital question here is one of good faith and when so important features of the act (essential, we think, to the completion and fulfillment of the legislative intent) are condemned as affirmative local legislation under the guise of a general law, the infirmity is such as to permeate the whole act and work its destruction."

Similarly, in *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 18 So. 2d 810 (1944), the Court concluded that a severability clause should not be given effect if the remaining portions of the Act were in contravention of the obvious legislative intent. The following language is relevant:

> "We recognize the force of the argument that the separability clause should be given effect, where possible, to save the Act. But the principle is well understood that a clause of this character may not be invoked to save the Act when in contravention of the obvious legislative intent."

In *Wilkinson v. Stiles*, 200 Ala. 279, 76 So. 45 (1917), the Court considered whether an act should be saved by striking out "a void exception, proviso, or other restrictive clause." The following language is relevant:

> "It is the general rule of statutory construction that if by striking out a void exception, proviso, or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative

> intent, and the whole would be affected and made void by the invalidity of such part. . . . If a clause in a statute which violates the Constitution cannot be rejected without causing the act to enact what the Legislature never intended, the whole statute must fall. . . . Here we have a clause expressly excepting cities of a population of 35,000 or more, and to strike said clause and uphold the rest of the act would extend the law to every city in the state, although the Legislature said that it should not do so."

In *McLendon v. State*, 179 Ala. 54, 60 So. 392 (1912), the Court considered a licensing statute which exempted "ex-Confederate soldiers." The exemption was held invalid under the Fourteenth Amendment to the Federal Constitution. The Court went on to hold that it would be improper simply to strike the exemption from the statute because it "would be in effect to make a statute materially different from that enacted by the Legislature."

In *Eliasberg Brothers Mercantile Co. v. Grimes*, 204 Ala. 492, 86 So. 56 (1920), the Court held that an income tax statute with rates of from 2% to 4% violated a constitutional prohibition against taxation at a rate greater than 65/100 of 1%. Then the Court considered whether the statute should be held valid to the extent fo 65/100 of 1% although invalid as to the excess. As the following language indicates, the Court held that this should be done:

> [4] It is the view of the Chief Justice that the income provision, though void as to its levy in excess of 65/100 of 1 per centum, may nevertheless be upheld as a valid levy pro tanto. In our desire to avoid the complete nullification of this important legislative provision, we have

given serious and anxious consideration to that suggestion. We have, however, reached the conclusion that to declare it law in that amended form would be in effect nothing less than judicial legislation, and would be a dangerous departure from the settled rules that govern courts in respect to such legislation. The matter of its rate permeated every part and entered into every aspect of the levy. It is clear that the Legislature did not intend to tax all incomes alike, and whether they would have allowed any exemptions at all, or in what amounts, under a flat-rate levy of 65/100 of 1 per centum, and how they would have dealt with other features of the scheme, we cannot say except as a matter of the sheerest conjecture. If the matter were not complicated by these considerations, it is possible that a way could be found, under the decision of Wiley v. Parmer, 14 Ala. 627, to save the levy pro tanto.

* * *

It is better that the state should endure the loss and delay which must follow our ruling than that courts should exercise their at least doubtful discretion in adjusting, mending or reconstructing unconstitutional legislation.

In *A. Bertolla & Sons v. State*, 247 Ala. 269, 24 So. 2d 23 (1945), the Court stated the following:

Where the valid and invalid parts are so bound together that the invalid part is a material inducement to the valid portion, the whole is invalid.

The Smackover Proviso, the Royalty Owner Exemption and the Pass-Through Prohibition are all salient points of Act 434. They were not in the original bill but were added by amendment during the legislative process. They were all added at the same time. Each reflected a very important purpose of the legislature. It would violate the principles of the foregoing authorities to hold one or more of these provisions invalid but then to hold the remainder of the Act valid. Such a result would manifestly contravene the legislative intent, Accordingly, Act 434 is void and invalid in its entirety.

XI. ENFORCEMENT OF GAS SALES CONTRACTS

Plaintiff, Warrior Drilling and Engineering Co., Inc., has gas purchase contracts with Defendants Southern Natural Gas Company and Alabama Gas Corporation. Warrior's contract with Alabama Gas Corporation is dated May 1, 1978, and provides in Article IX, paragraph 9.2:

> Buyer will reimburse seller for one hundred percent (100%) of any increase in the total cost per Mcf. to seller occurring after the date of initial deliveries hereunder, occasioned by any change in the rate of existing severance tax, or by the imposition or substitution of any new excise taxes, including sales, occupation, severance, gathering, or other taxes of like nature in respect to the gas under this contract.

Warrior's contract with Southern Natural Gas Company is dated April 6, 1979 and provides in Article VIII, section 3:

> Buyer agrees to reimburse seller for one hundred percent (100%) of any taxes now and hereafter lawfully imposed upon and paid by seller with respect to the gas delivered hereunder subject to the further provisions of this Article VIII and

provided buyer is permitted to reflect such tax reimbursement in its jurisdictional resell rates.

Plaintiff Pruett Production Company also has a gas purchase contract with Defendant Southern Natural Gas Company, which said contract is dated August 1, 1979 and provides in Article VIII, Section 3:

> Buyer agrees to reimburse seller for one hundred percent (100%) of any taxes now and hereafter lawfully imposed upon and paid by seller with respect to the gas delivered hereunder subject to the further provisions of this article VIII and provided buyer is permitted to reflect such tax reimbursement in its jurisdictional resell rate.

Plaintiff Anereman Operating Company has a gas purchase contract with Coronado Transmission Company, dated June 25, 1979, which provides in Article X, paragraph 10.1 as follows:

> Seller shall pay all excise, severance, sales, occupation and other taxes of like nature levied in respect to the gas and handling thereof prior to the delivery to buyer, at the rate or rates existing as of the date of this contract. Nothwithstanding the provisions of this paragraph, in the event FPC, FERC, or successor body having jurisdiction allows reimbursement of current excise, severance, sales, occupation and other taxes of like nature, then buyer shall reimburse seller for all such taxes paid to the extent allowed by the agency having jurisdiction.

Defendant Southern Natural Gas Company and Coronado Transmission Company have failed and refused to reimburse the seller of gas, i. e., Warrior, Pruet or Anderman, as the case

may be, for any severance taxes paid by sellers including the old 4% in effect prior to Act 434. The Defendants, Southern Natural Gas company and Coronado Transmission Company, are relying on Act 434 in their refusal to reimburse any severance taxes paid by sellers pursuant to their respective gas purchase contracts. In view of this Court's finding that Act 434 is null and void for the reasons herein stated, it is the order and judgment of this Court and it is hereby ordered that Southern Natural Gas Company and Coronado Transmission Company pay the 4% severance tax due to sellers (Warrior, Pruet, and Anderman) since September 1, 1979, according to the terms of their respective gas purchase contracts.

Appropriate judgments will be entered in each case, and the parties in each case (Warrior and Southern Natural Gas Company. Warrior and Alabama Gas Corporation; Pruet and Southern Natural Gas Company; and Anderman and Coronado Transmission Company) are directed to confer among themselves in an attempt to agree upon the amount of reimbursement due and report to this Court within 10 days. The Court retains jurisdiction in the event the parties are unable to agree upon the amount of reimbursement.

ORDER

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that Act 434, 1979 Session Alabama Legislature, be and the same is hereby declared to be null, void, and unconstitutional in all respects and of no further force or effect.

It is further, ORDERED, ADJUDGED and DECREED by the Court that each of the Plaintiffs herein is entitled to a refund of the taxes paid by them under and pursuant to the provisions of Act 434 and the Defendant is hereby ordered to pay and refund to each of them the amounts so paid by each of said Plaintiffs, with cost of court herein to be taxed against the Defendant. Appropriate judgment will be entered in each case and the parties are directed to confer among themselves in an attempt to agree upon the amounts to be refunded and report to the Court within 10 days. The Court retains jurisdiction in the event the parties are unable to agree upon the amount of refund.

DONE at Montgomery, Alabama on this 12th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

APPENDIX C

IN THE CIRCUIT COURT OF MONTGOMERY MONTGOMERY COUNTY, ALABAMA

EXCHANGE OIL AND GAS CORPORATION,
Plaintiff,

VS.

RALPH EAGERTON, Commissioner of Revenue of the State of Alabama,
Defendant.

CV-79-1284-H
and

CV-79-1362-H	CV-80-168-H	CV-80-564-H
CV-79-1363-H	CV-80-121-H	CV-80-565-H
CV-79-1397-H	CV-80-421-H	CV-80-566-H
CV-79-1529-H	CV-80-863-H	CV-80-567-H
CV-79-1338-H	CV-80-351-H	CV-80-568-H
CV-79-1583-H	CV-80-714-H	CV-80-569-H
CV-79-1622-H	CV-80-509-H	CV-80-517-H
CV-79-1508-H	CV-80-074-H	CV-80-518-H
CV-79-1509-H	CV-80-224-H	CV-80-519-H
CV-79-1510-H	CV-80-225-H	CV-80-520-H
CV-80-006-H	CV-80-226-H	CV-80-780-H
CV-80-165-H	CV-80-227-H	CV-80-781-H
CV-80-166-H	CV-80-228-H	CV-80-782-H
CV-80-167-H	CV-80-229-H	CV-80-783-H

AMENDMENT TO OPINION AND ORDER

This Court having been advised that its Order of June 12, 1980, does not rule on the Complaint of Coronado Transmission Company against Alabama Gas Corporation, the Court on its own initiative hereby amends section XI ENFORCEMENT OF GAS SALES CONTRACTS, Page 43, of said Order, by adding the following:

"Pursuant to the joint stipulation between Alabama Gas Corporation and Coronado Transmission Company submitted at the trial of this cause and this Court's Order and Opinion of June 13, 1980, it is the order and judgment of this Court and it is hereby ORDERED that Alabama Gas Corporation pay four percent (4%) severance tax due to Coronado Transmission Company since September 1, 1979, according to the terms of their current gas purchase contract.

"An appropriate judgment will be entered and Coronado Transmission Company and Alabama Gas Corporation are directed to confer in an attempt to agree upon the amount of reimbursement due and to report to this Court within ten days."

DONE at Montgomery, Alabama on this 17th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

APPENDIX D

THE STATE OF ALABAMA JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

SPECIAL TERM 1981

July 10, 1981

79-823

RALPH P. EAGERTON, JR., AS
COMMISSIONER OF REVENUE OF
THE STATE OF ALABAMA

VS.

EXCHANGE OIL AND GAS CORPORATION,
ET AL.

MONTGOMERY CIRCUIT COURT

This cause having been duly argued and submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court be reversed and annulled and that this cause be remanded to the court below for further proceedings therein.

IT IS FURTHER ORDERED AND ADJUDGED that the appellees, Exchange Oil and Gas Corporation; Anderman Operating Company, a corporation; Citmoco Services, Inc., a corporation; Exxon Corporation, a corporation; Getty Oil Company, a corporation; Gulf Oil Corporation, a corporation; The Louisiana Land and Exploration Company, a corporation; Midrock Operating Company, a corporation; Petroleum Corporation of Texas; Placid Oil Company; Pruet Production

Company, a corporation; Terra Resources, Inc.; Union Oil Company of California; and Warrior Drilling and Engineering Company, Inc., a corporation; pay the costs of appeal as provided by the Alabama Rules of Appellate Procedure, for which cost let execution issue.

OPINION BY BEATTY, J.
ALL THE JUSTICES CONCUR.

APPENDIX E

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

MAILING ADDRESS:
P.O. Box 157
Montgomery Alabama 36101

TELEPHONE: 832-6480

September 4, 1981

Re: 79-832

RALPH P. EAGERTON, Jr., as Commissioner, etc.
Appellant

vs.

Exchange Oil and Gas Corporation, et al
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Application for rehearing overruled. No opinion written on rehearing.

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

APPENDIX F

IN THE SUPREME COURT OF ALABAMA

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of
the State of Alabama,

Appellant,

VS.

EXCHANGE OIL AND GAS CORPORATION, et al.,

Appellee.

CASE No. 79-823

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company, Appellees in the above style cause, hereby appeal to the Supreme Court of the United States from the decision and final order entered in this action on July 10, 1981, by the Supreme Court of Alabama reversing the judgment of the Circuit Court of Montgomery County, Alabama. (After timely applications for rehearing were filed, rehearing was denied on September 4, 1981.)

This appeal is taken pursuant to 28 U.S.C. §1257(2).

[FILED IN THE SUPREME COURT
OF ALABAMA ON NOVEMBER 23,
1981]

[FILED IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY ON
NOVEMBER 23, 1981]

/s/ LOUIS E. BRASWELL
LOUIS E. BRASWELL
Attorney for Exxon Corporation,
Gulf Oil Corporation and The
Louisiana Land and Exploration
Company, Appellants
Post Office Box 123
Mobile, Alabama 36601

PROOF OF SERVICE

I LOUIS E. BRASWELL, one of the attorneys for Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company, Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of November, 1981, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on all parties required to be served, as follows:

1. On Appellee herein Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, by depositing a copy in a United States post office, with first class postage prepaid, addressed to John J. Breckenridge, his counsel of record, at 201 Administrative Building, Montgomery, Alabama, 36130.

2. On all other parties to the proceeding below, by depositing copies in a United States post office, with first class postage prepaid, addressed to their respective attorneys of record, as follows:

To Rae M. Crowe, Esq., Attorney for Exchange Oil and Gas Corporation, Getty Oil Company, Placid Oil Company, Terra Resources, Inc., and Union Oil Company of California,
1101 Merchants National Bank Building

Post Office Box 290
Mobile, Alabama 36601;

TO Euel A. Screws, Jr., Esq. Attorney for Exchange Oil and Gas Corporation, Getty Oil Company, Placid Oil Company, Terra Resources, Inc., and Union Oil Company of California,
Post Office Box 347
Montgomery, Alabama 36101;

TO Robert C. Black, Esq., Attorney for Citmoco Services, Inc.,
Hill Building
Montgomery, Alabama 36104

TO James R. Seale, Esq., Attorney for Anderman Operating Company, Midroc Operating Company, Pruet Production Company, and Warrior Drilling and Engineering Company, Inc.,
Post Office Box 2069
Montgomery, Alabama 36103;

To Macbeth Wagnon, Jr., Esq., Attorney for Alabama Gas Corporation and Alagasco Pipeline Company,
1500 Brown-Marx Building
Birmingham, Alabama 35203;

TO L. Murray Alley, Esq., Attorney for Southern Natural Gas Company,
1900 First National-Southern Natural Building
Birmingham, Alabama 35203

TO Edward S. Allen, Esq., Attorney for Coronado Transmission Company,
Post Office Box 306
Birmingham, Alabama 35201

TO Porter, Gonzalez & Rogers, Attorneys for Petroleum Corporation of Texas,
1800 Guaranty Bank Plaza
Corpus Christi, Texas 78475.

I further certify that on said date I mailed the foregoing Notice of Appeal, with first class postage prepaid, to the Clerk of the Circuit Court of Montgomery County, Alabama, inasmuch as that court may be possessed of the record.

/s/ LOUIS E. BRASWELL
LOUIS E. BRASWELL
Attorney for Exxon Corporation
Gulf Oil Corporation and The
Louisiana Land and Exploration
Company

OF COUNSEL:

Hand, Arendall, Bedsole,
Greaves & Johnston
Post Office Box 123
Mobile, Alabama 36601

APPENDIX G

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

EXXON CORPORATION, a corporation,

Plaintiff,

VS.

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,

Defendant.

CIVIL ACTION NOS. CV-79-1529, CV-80-121 and CV-80-421

FINAL JUDGMENT AND DECREE

These three cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null. void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $1,483,139.28 under protest and that these cases were timely commenced for the purpose of seeking a refund of the taxes, IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $1,483,139.28, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 30th day of Jue, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

EXXON CORPORATION, a
corporation,

Plaintiff,

v.

RALPH EAGERTON,
Commissioner of Revenue
of the State of Alabama,

Defendant.

CIVIL ACTION NOS. CV-79-1529,
CV-80-121 and CV-80-421

AMENDED FINAL JUDGMENT AND DECREE

This Amended Final Judgment and Decree is entered Pursuant to the parties' Amended Stipulation and Motion. These three cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $1,529,764.70 under protest and that these cases were timely commenced for the purpose of seeking a refund of taxes, IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $1,529,764.70, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 28th day of July, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

GULF OIL CORPORATION, a corporation,

Plaintiff

vs.

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,

Defendant

CIVIL ACTION NOS. CV-79-1622
CV-80-509

FINAL JUDGMENT AND DECREE

These two cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $22,489.76 under protest and that these cases were timely commenced for the purpose of seeking a refund of the taxes, IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $22,489.76, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The Cost of Court is hereby taxed against Defendant.

DONE this 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

GULF OIL CORPORATION, a corporation,

Plaintiff,

v.

RALPH EAGERTON,
Commissioner of Revenue
of the State of Alabama

Defendant.

CIVIL ACTION NO. CV-79-1622
AND CV-80-509

FINAL JUDGMENT AND DECREE

These two cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $25,988.14 under protest and that these cases were timely commenced for the purpose of seeking a refund of the taxes, IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $25,988.14 in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 22nd day of July, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

THE LOUISIANA LAND AND EXPLORATION COMPANY, a corporation,

Plaintiff.

vs.

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,

Defendant.

CIVIL ACTION NOS. CV-80-006, CV-80-351- and CV-80-714

FINAL JUDGMENT AND DECREE

These three cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null. void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $47,526.32 under protest and that these cases were timely commenced for the purpose of seeking a refund of the taxes. IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED tha Plaintiff is due and entitled to be refunded by Defendant the sum of $47,526.32, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE THIS 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

THE LOUISIANA LAND AND
EXPLORATION COMPANY, a corporation

Plaintiff,

V.

RALPH EAGERTON,
Commissioner of Revenue
State of Alabama,

Defendant.

CIVIL ACTION NOS. CV-80-0006,
CV-80-351 and CV-80-714

AMENDED FINAL JUDGMENT AND DECREE

This amended Final Judgment and Decree is entered pursuant to the parties' Amended Stipulation and Motion. These three cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $55,187,49 under protest and that these cases were timely commenced for the purpose of seeking a refund of taxes, IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $55,187.49, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 28th day of July, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ANDERMAN OPERATING CO., a corporation,

Plaintiff,

VS.

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,

Defendant.

CIVIL ACTION NOS. CV-79-1510-H CV-80-167-H, CV-80-518–H and CV-80-782-H

FINAL JUDGMENT AND DECREE

These four cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $10,897.81 under protest and that these cases were timely commenced for the purpose of seeking a refund of the taxes, IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $10,897.81, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

ANDERMAN OPERATING CO., a corporation,
Plaintiff,

v.

RALPH EAGERTON, COMMISSIONER
OF REVENUE OF THE STATE OF
ALABAMA; and CORONADO
TRANSMISSION COMPANY, a corporation,
Defendants.

CORONADO TRANSMISSION COMPANY,
a corporation,
Third-Party Plaintiff,

v.

ALAMBAM GAS CORPORATION, a corporation,
Third-Party Defendant.

CIVIL ACTION NO. CV-79-1510-P

AMENDED FINAL JUDGMENT AND DECREE

It having come to the Court's attention that no judgment was entered on the claim of Anderman Operating Company against Coronado Transmission Company, and Coronado Transmission Company's Thrid-party complaint against Alabama Gas Corporation; and the Court being of the opinion that pursuant to the Court's Opinion and Order of June 12, 1980, declaring Act 434 of the Alabama Legislature to be null, void, and unconstitutional, that the said Anderman Operating Company and Coronado Transmission Company are entitled to judgments in their favor; and it having been agreed between Anderman Operating Company and Coronado Transmission Company, and Coronado Transmission Company and Alabama Gas Corporation that the amount of the judgment for severance taxes paid but not reimbursed through May, 1980 is $52,

169.75; therefore

It is hereby ORDERED, ADJUDGE, DECLARED and DECREED that Anereman Operating Company is awarded a judgment in the amount of $52,169.75 against Coronado Transmission Company for severance taxes paid pursuant to their contract for the purchase of natural gas, and that Coronado Transmission Company is awarded a judgment in the amount of $52,169.75 against Alabama Gas Corporation for severance taxes paid pursuant to their contract for the purchase of natural gas. Each individual party is to bear its own court costs.

DONE this 7th day of August, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CITMOCO SERVICES, INC., a corporation,

Plaintiff

v.

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,

Defendant

CIVIL ACTION NO. CV-79-1338-H

FINAL JUDGMENT AND DECREE

This cause having been tried along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $24,584.77 under protest and that this case was timely commenced for the purpose of seeking a refund of the taxes, IT SI HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $24,584.77, in accordance with §§40-1-11 and 12, Code of Alabama 1975. The cost of Court is hereby taxed against Defendant.

DONE this 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

EXCHANGE OIL AND GAS CORPORATION,
Plaintiff,

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Fevenue of the State of Ablabam,
Defendant.

CIVIL ACTION NOS. CV-79-1284-H
CV-80-224-H, and CV-80-568-H

FINAL JUDGMENT AND DECREE

Thses three cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $62,529.90 under protest and that these cases were timely commenced for the purpose of seeking a refund of the taxes, IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $62,529.90, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

GETTY OIL COMPANY,

Plaintiff,

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

defendant.

CIVIL ACTION NOS. CV-79-1363-H
CV-80-226-H, and CV-80-565-H

FINAL JUDGMENT AND DECREE

Thses three cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $669,838.25 under protest and that thses cases were timely commenced for the purpose of seeking a refund of the taxes, IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $669,838.25, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

MIDROC OPERATING CO., a corporation,

Plaintiff.

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant.

CIVIL ACTION NOS. CV-80-168-H
CV-80-517-H and CV-80-781-H

FINAL JUDGMENT AND DECREE

These three cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null. void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $107,044.23 under protest and that thses cases were timely commenced for the purpose of seeking a refund of the taxes. IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $107,044.23, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

PETROLEUM CORPORATION OF TEXAS,

Plaintiff

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant.

CIVLI ACTION NOS. CV-79-1397-H
CV-80-228-H, and CV-80-569-H

FINAL JUDGMENT AND DECREE

These three cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $7,700.24 under protest and that these cases were timely commenced for the purpose of seeking a refund of the taxes, IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $7,400.24, in accordance with §§ 40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxes against Defendant.

DONE this 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

PLACID OIL COMPANY,

Plaintiff,

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant.

CIVIL ACTION NOS. CV-80-074-H
CV-80-229-H, and CV-80-567-H

FINAL JUDGMENT AND DECREE

These three cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null. void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $316,592.17 under protest and that these cases were timely commenced for the purpose of seeking a refund of the taxes. IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $316,592.17 in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

PRUET PRODUCTION CO., a corporation,

Plaintiff,

vs.

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,

Defendant.

CIVIL ACTION NOS. CV-79-1508-H, CV-80-165-H, CV-80-519-H and CV-80-780-H

FINAL JUDGMENT AND DECREE

These four cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $163,787.96 under protest and that these cases were timely commenced for the purpose of seeking a refund of the taxes, IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant sum of $163,787.96, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

TERRA RESOURCES, INC.,

Plaintiff,

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant.

CIVIL ACTION NOS. CV-79-1362-H
CV-80-227-H, and CV-80-564-H

FINAL JUDGMENT AND DECREE

These three cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $276,508.53 under protest and that these cases wer timely commenced for the purpose of seeking a refund of the taxes, IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $276,508.53, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

UNION OIL COMPANY OF CALIFORNIA,

Plaintiff,

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant.

CIVIL ACTION NOS. CV-79-1383-H
CV-80-225-H, and CV-80-566-H

FINAL JUDGMENT AND DECREE

These three cases having been tries together along with other consolidated cases, and the Court having entered its Opinion and Order on June 12, 1980, which concluded and ordered that Plaintiff is entitled to a refund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $937,385.93 under protest and that these cases were timely commenced for the purpose of seeking a refund of the taxes, IT IS HEREBY ORDERED, ADJUDGED DECLARED that Plaintiff is due and entitled to be refunded by Defendant the sum of $937,385.93, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

WARRIOR DRILLING AND ENGINEERING CO., INC.,
a corporation,

Plaintiff,

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant.

CIVIL ACTION NOS. CV-79-1509-H
CV-80-166-H, CV-80-520-H and
CV-80-783-H

FINAL JUDGMENT AND DECREE

These four cases having been tried together along with other consolidated cases, and the Court having entered its Opinion and Order on june 12, 1980, which concluded and ordered that Plaintiff is entitled to a redund of certain taxes paid under an Act of the Alabama Legislature held to be null, void and unconstitutional, and it having been agreed between Plaintiff and Defendant that Plaintiff paid taxes in the amount of $51,951.67 under protest and that these cases were timely commenced for the purpose of seeking a refund of the taxes, IT IS HEREBY ORDERED, ADJUDGED, DECLARED AND DECREED that Plaintiff is due and entitled to be refunded by Defendant the sum of $51,951.67, in accordance with §§40-1-11 and 12, Code of Alabama, 1975. The cost of Court is hereby taxed against Defendant.

DONE this 30th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

APPENDIX H

CIVIL ACTION Nos.
CV-79-1622
CV-80-509

GULF OIL CORPORATION, a corporation.

Plaintiff,

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant

CIVIL ACTION Nos.
CV-80-006
CV-80-351
CV-80-714

THE LOUISIANA LAND AND EXPLORATION
COMPANY, a corporation,

Plaintiff

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant.

CIVIL ACTION Nos.
CV-80-168-H
CV-80-517-H
CV-80-781-H

MIDROC OPERATING COMPANY.
a corporation,

Plaintiff,

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant

CIVIL ACTION Nos.
CV-80-074-H
CV-80-229-H
CV-80-567-H
CV-80-887-H

PLACID OIL COMPANY,

Plaintiff,

vs.

RALPH P. EAGERTON, JR.,
As Commissioner of Revenue of the
State of Alabama,

Defendant.

CIVIL ACTION Nos.
CV-79-1383-H
CV-80-225-H
CV-80-566-H
CV-80-888-H

UNION OIL COMPANY OF CALIFORNIA,

Plaintiff,

vs.

RALPH P. EAGERTON, JR. as
Commissioner of Revenue of
the State of Alabama,

Defendant.

CIVIL ACTION Nos.
CV-79-1284-H
CV-80-224-H
CV-80-568-H
CV-80-889-H

EXCHANGE OIL AND GAS CORPORATION,

Plaintiff.

vs.

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,

Defendant.

CIVIL ACTION Nos.
CV-79-1338-H

CITMOCO SERVICES, INC., a corporation,

Plaintiff.

vs.

RALPH P. EAGERTON, JR. as Commissioner of Revenue of the State of Alabama,

Defendant.

CIVIL ACTION Nos.
CV-79-1529
CV-80-121
CV-80-421
CV-80-863-H

EXXON CORPORATION, a corporation,

Plaintiff,

vs.

RALPH P. EAGERTON, JR. as
Commissioner of Revenue of the
State of Alabama,

Defendant.

CIVIL ACTION Nos.
CV-79-1363-H
CV-80-226-H
CV-80-565-H
CV-80-886-H

GETTY OIL COMPANY, a
corporation,

Plaintiff,

vs.

RALPH P. EAGERTON, JR.,
as Commissioner of Revenue
of the State of Alabama,

Defendant.

CIVIL ACTION Nos.
CV-79-1509-H
CV-80-166-H
CV-80-520-H
CV-80-783-H

WARRIOR DRILLING AND ENGINEERING CO.,
INC., a corporation,

Plaintiff,

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant

CIVIL ACTION Nos.
CV-79-1397-H
CV-80-228-H
CV-80-569-H
CV-80-885-H

PETROLEUM CORPORATION OF TEXAS.

Plaintiff.

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant.

CIVIL ACTION Nos.
CV-79-1508-H
CV-80-165-H
CV-80-519-H
CV-80-780-H

PRUET PRODUCTION CO., a
corporation,

Plaintiff

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant.

CIVIL ACTION Nos.
CV-79-1362-H
CV-80-227-H
CV-80-564-H
CV-80-890-H

TERRA RESOURCES, INC.,

Plaintiff,

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant.

CIVIL ACTION Nos.
CV-79-1510-H
CV-80-167-H
CV-80-518-H
CV-80-782-H

ANDERMAN OPERATING CO.,
a corporation,

Plaintiff,

vs.

RALPH P. EAGERTON, JR., as
Commissioner of Revenue of the
State of Alabama,

Defendant.

FINAL OPINION AND JUDGMENT

This cause having come on for hearing before this Court on remand from the Supreme Court of Alabama and this Court having fully read and considered the opinion of the Supreme Court of Alabama entered herein on July 10, 1981 in Eagerton v. Exchange Oil and Gas Corporation, a rehearing thereon having been denied on September 4, 1981, the Court finds and orders as follows:

1. Under the opinion and mandate of the Supreme Court in Eagerton v. Exchange Oil and Gas Corporation all orders of this Court regarding the construction and unconstitutionality of Act 79-434 should be withdrawn and vacated, except as to the findings and decrees of this Court with respect to Plaintiff's application and claim for taxation at the rate of 4% on

all wells producing less than 26 barrels of oil per day based on the gross value of the oil and gas of those wells at the point of production.

2. The portion of Paragraph 1(a) of Act 79-434 which provided that "all wells producing less than 26 barrels of oil per day shall be taxed at the rate of four percent (4%) on the said value of said *oil* and *gas* at the point of production" taxes all wells which produce less than 26 barrels of oil per day at the rate of 4%. This language applies to wells producing either oil or gas and taxes their production at the 4% rate under the plain and unambiguous meaning of the language. If the legislature had intended to restrict the language only to oil wells, it would have made this provision applicable to "All *oil* wells" and would not have taxed production at the rate of 4% on the value of either "oil or gas at the point of production." Furthermore, in every instance, Act 79-434 makes reference to "oil and gas" except in the instance of taxing wells which produce less than 26 barrels of *oil* per day. In *Town of Loxley v. Rositin Water, Sewer and Fire Protection Authority, Inc.*, 376 So. 2d 705 (Ala. 1979) the Supreme Court held that ". . . . while specific language used by the legislature is subject to explanation, such language cannot be detracted from, or added to." The plain meaning of this language must prevail because "when the intent of the legislature can be determined from the language of the statute itself, we need not resort to extraneous matters to determine the legislative intent." *Eagerton v. Exchange Oil and Gas Corporation*, 15 ABR 1976, at 1802.

"Courts can only learn what [the] legislature intended by what it has said, and have no right to stray into mazes of conjecture or search for an imaginary purpose in [construing] the statutes." *Alabama Industrial Bank v. State Ex Rel Avinger*, 286 Ala. 59, 237 So. 2d 108 (1970). Thus, all wells which produce less than 26 barrels of oil as that term is defined by §40-20-1(4) Code of Alabama 1975 are taxed at the rate of

4% under Act 79-434.

NOW THEREFORE, it is further ORDERED, ADJUDGED and DECREED by the Court that this Court's opinion and order of June 12, 1980, as amended by this Court's final judgment and decree on June 30, 1980, July 22, 1980, and July 28, 1980, are hereby withdrawn and vacated, EXCEPTING, and only excepting such portions, findings and decrees contained therein with respect to Plaintiff's application and claim for taxation at the rate of 4% under the provisions of §1(a) of Act 79-434 which provides as follows:

> "All wells producing less than 26 barrels of oil per day shall be taxed at the rate of four percent (4%) on the said value of said *oil* and *gas* at the point of production."

and it is further ORDERED, ADJUDGED and DECREED by the Court that § 1(a) of Act 79-434 taxes all wells which produce less than 26 barrels of oil per day at the rate of 4% of the value of oil and gas at the point of production; and it is further ORDERED, ADJUDGED and DECREED by the Court that Plaintiff, Terra Resources, Inc., is due and entitled to be refunded by the Defendant the sum of $276,508.53; that Plaintiff, Petroleum Corporation of Texas is due and entitled to be refunded the sum of $7,700.24; that Plaintiff, Pruet Production Company is due and entitled to be refunded the sum of $51,548.31; that Plaintiff, Warrior Drilling and Engineering Co., Inc. is due and entitled to be refunded the sum of $51,951.67; and that Plaintiff Anderman Operating Co. is due and entitled to be refunded the sum of $10,987.81 in accordance with §40-1-11 and §40-1-12, Code of Alabama 1975.

Costs of Court are hereby taxed in favor of the Defendant in all cases and against the individual oil company plaintiffs in their respective cases, for which execution may issue.

DONE this the 30th day of September, 1981.

/s/ Perry O. Hooper
Circuit Judge,

APPENDIX I

Act No. 79-434 **H. 148–Hines**

AN ACT

To amend Code of Alabama 1975, Sections 40-20-2 and 40-20-8, so as to increase the rate of tax; to provide further for distribution of the proceeds of the tax; and to provide certain exemptions from the increased rate.

Be It Enacted by the Legislature of Alabama:

Section 1. Code of Alabama 1975, Section 40-20-2, is amended to read as follows:

"§40-20-2. (a) There is hereby levied, to be collected hereafter, as herein provided, annual privilege taxes upon every person engaging or continuing to engage within the State of Alabama in the business of producing or severing oil or gas as defined herein, from the soil or the waters, or from beneath the soil or the waters, of the state for sale, transport, storage, profit, or for use. The amount of such tax shall be measured at the rate of six per centum of the gross value of said oil or gas at the point of production. All wells producing less than 26 barrels of oil per day shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production. All wells that come into production after the effective date of this Act shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production for a period of ten years after production begins. Ten years after production begins, such tax shall then be imposed at the rate of six per centum (6%) on such wells that go into production after the effective date of this Act. Provided, however, that said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation. (b) The tax is hereby levied upon the basis of the entire produc-

tion in this state, including what is known as the royalty interest, on which production the amount of such tax shall be a lien, regardless of the place of sale or to whom sold, or by whom used, or the fact that the delivery may be made to points outside the state; and the tax shall accrue at the time such oil or gas is severed from the soil or the waters, or from beneath the soil or the waters, and in its natural, unrefined, or unmanufactured condition. (c) A county, city, town or municipality of the state of Alabama shall not establish, levy, impose or collect as a condition of doing business or otherwise, any tax, fee, license or charge, whatsoever, directly or indirectly, on or with respect to the production, treating, processing, ownership, sale, storage, purchase, marketing, or transportation on any oil or gas produced in the state of Alabama and on which severance taxes have been paid to the state of Alabama, or upon the business of producing, treating, processing, owning, selling, buying, storing, marketing or transporting such oil, or gas or upon the ownership, operation or maintenance of plants, facilities, machinery, pipe lines, gathering lines or any equipment, whatsoever, which are, or may be necessary or convenient to the production, treating, processing, ownership, storage, sale, purchase, marketing, or transportation of such oil or gas; provided, that nothing herein shall be construed to prohibit, limit or restrict a county, city, town or municipality from imposing and collecting ad valorem taxes on any property, real or personal not otherwise now exempted by law; further, the limitation herein imposed upon counties, cities, towns and municipalities shall not apply to any county, city, town or municipality which does not receive a share of the severance tax under the provisions of this article. (d) Nothing contained herein shall be deemed to limit or to enlarge the authority of a county, city, town or municipality to levy taxes or licenses on oil refining facilities located therein or on the suppliers of services or goods not including oil or gas to those persons engaging in the business of producing, treating, processing, owning, selling, buying, storing, marketing or transporting such oil or gas. Any person who is a royalty owner shall be exempt from the payment of any increase in

taxes herein levied and shall not be liable therefor. (e) The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas."

Section 2. Code of Alabama 1975, Section 40-20-8, is amended to read as follows:

"§40-20-8. (a) Sixty-six and two-thirds per centum (66-2/3%) of the net amount of all taxes herein levied and collected by the department, after the same has been certified into the state treasury, shall be allocated and distributed by the comptroller to the credit of the general fund of the state and to the county in which the oil or gas was produced and to the municipalities therein in the proportion set out in the following schedule: (1) Twenty-five per centum (25%) of all taxes herein levied and collected on oil and gas produced from oil or gas wells located within any county, shall be allocated and distributed to each such county for county purposes or to be expended at the discretion of the county governing body. In all counties having a population of not less than 34,875, nor more than 36,000, according to the 1970 federal decennial census, such funds shall be allocated and distributed to the boards of education of the public schools in such counties on a pro rata basis as established by the number of children in net enrollment in the public schools during the prior school attendance year. In all counties having a population of not less than 16,000 nor more than 16,250, according to the 1970 federal decennial census, such funds shall be allocated and distributed as follows: Each year the first $150,000 shall be paid to the custodian of the county school funds and after the payment of said $150,000 each year the balance of said funds shall be divided and paid 1/3 to the custodian of the county school funds and 2/3 to the

custodian of the county general funds (2) Ten percent (10%) of all taxes herein levied and collected on oil and gas produced from oil or gas wells located within the corporate limits or the police jurisdiction of any municipality shall be allocated and distributed to each such municipality. (3) Fifty percent (50%) of the first one hundred and fifty thousand dollars ($150,000.00) remaining, or any part thereof, collected per year under the provisions of this article to the state forty-two and one-half percent (42-½%) to the county; and seven and one-half percent (7-½%) to municipalities therein on a population basis. (4) Eighty-four per centum (84%) of all additional sums collected per year under the provisions of this article to the state; fourteen per centum (14%) to the county; and two per centum (2%) to municipalities therein on a population basis.

"(b) Sixteen and two-thirds per centum (16-2/3%) of the net amount of all taxes herein levied and collected by the department shall be certified into the state treasury to the credit of the state General Fund.

"Sixteen and two-thirds per centum (16-2/3%) of the net amount of all taxes herein levied and collected by the department on oil and gas produced from oil or gas wells located within any county, shall be allocated and distributed to each such county for county purposes to be expended at the discretion of the governing body.

Section 3. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not effect the part which remains.

Section 4. This Act shall become effective on the first day of the second month after its passage and approval by the Governor, or its otherwise becoming a law.

Approved July 19, 1979
Time: 11:45 P.M.

APPENDIX J

RELEVANT PROVISIONS OF THE UNITED STATES CONSTITUTION

The Supremacy Clause of the Constitution of the United States, Art. VI, cl. 2, states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

The Contract Clause of the Constitution of the United States, Art. 1. Sec. 10, cl. 1, states:

> No state shall . . . pass any . . . law impairing the obligation of contracts . . .

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, Sec. 1, states:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX K

NATURAL GAS ACT 15 U.S.C. §§717 (a) - (b), 717c

§717. Necessity for regulation of natural-gas companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act [15 USCS §§717 st seq.] shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

§717c Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect [June 21, 1938]) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with wll contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause, shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission

shall have authority either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found ot justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as peedily as possible.

(June 21, 1938, c. 556, §4, 52 Stat. 822; May 21, 1962, P. L. 87-454, 76 Stat. 72.)

APPENDIX L

NATURAL GAS POLICY ACT OF 1978 15 U.S.C. §§3319-3320

§3319. Ceiling price for other categories of natural gas

(a) **Application.** - The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of any natural gas delivered during any month, in the case of any natural gas which is not covered by any maximum lawful price under any other section of this part, including-

(1) natural gas produced from any new well not otherwise qualifying for a higher maximum lawful price under this subchapter;

(2) natural gas committed or dedicated to interstate commerce on November 8, 1978, and for which a just and reasonable rate under the Natural Gas Act was not in effect on such date for the first sale of such natural gas;

(3) natural gas which was not committed or dedicated to interstate commerce on November 8, 1978, and which was not subject to an existing contract on such day; and

(4) natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportaion system approved under the Alaska Natural Gas Transportation Act of 1976.

(b) **Maximum lawful price.**-

(1) The maximum lawful price under this section for any month shall be

(A) $1.45 per million Btu's in the case of April 1977; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adustment 1 factor applicable for such month.

(2) Ceiling prices may be increased if just and reasonable. The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is-

(A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

(B) just and reasonbale within the meaning of the Natural Gas Act.

Publ L. 95-621, Title I, §109, Nov. 9, 1978, 92 Stat. 3368.

§3320 Treatment of state severance taxes and certain production related costs

(a) Allowance for State severance taxes and certain production-related costs. Except as provided in subsection (b) of this section, a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exeeds the maximum lawful price to the extent necessary to recover.

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b) of this section; and

(2) any costs of compressing, gathering, processing, treattin, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

(b) Limitation on State severance taxes. –The State severance tax allowable under subsection (a) (1) of this section with respect to the production of any natural gas may include any amount of State severance taxes borne by the seller which results from a provision of State law enacted on or after December 1, 1977, unless such provisions of law is equally applicable to natural gas produced in such State and delivered in

interstate commerce and to natural gas produced in such State and not so delivered.

(c) Definition of State severance tax. For purposes of this section, the term "State severance tax" means any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas-

(1) by any State or Indian tribe (as defined in section 3316 (b) (2) (B) (ii) of this title); and

(2) by any political subdivision of a State if the authority to impose such tax, fee or other levy is granted to such political subdivision under State law.

Publ L. 95-621, Title I, §110, Nov. 9, 1978, 92 Stat. 3368.

APPENDIX M

Emergency Petroleum Allocation Act 15 U.S.C. § § 753, 757

§ 753 Mandatory allocation

(a) Regulation providing for mandatory allocation of crude oil, residual fuel oil, and refined petroleum products. Not later than fifteen days after the date of enactment ot this Act [enacted Nov. 27, 1973], the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d), such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b) Contents of regulation; price provisions; passthrough of increases; allocation to users of other fuels not obtainable. (1) The regulation under subsection (a), to the maximum extent practicable, shall provide for

(A) protection of public health (including the production of pharmaceuticals), safety, and welfare (including maintenance of residential heating, such as individual homes, Apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and com-

petitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of-

(i) fuels, and

(ii) minerals essential to the requirements of the United States, and for required transportation related thereto.

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

(2) In specifying prices (or prescribing the manner for determining them), the regulation under subsection (a)-

(A) shall provide for a dollar-for dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level;

(B)(i) shall not permit any net crude oil cost increases-

(I) which are incurred by a refiner during the calendar month immediately preceding the effective date of this paragraph, or in any month thereafter, and

(II) which are not passed through in prices charged pursuant to such regulation in the 2 calendar months

following the calendar month in which such crude oil cost increases were incurred,

to be passed through by such refiner in any month subsequent to the 2 calendar months following the calendar month in which such crude oil cost increases were incurred, unless the President makes the findings specified in clause (ii)(II)(aa), and such passthrough is consistent with the requirements specified in clause (ii)(II)(bb).

(ii) shall not permit the passthrough in any month of-

(I) any net crude oil cost increases incurred by a refiner not later than the last day of the calendar month which begins two months prior to the effective date of this paragraph and not passed through by the end of the last calendar month prior to the effective date of this paragraph unless such passthrough is not in excess of 10 percent of the total amount of such increased crude oil costs not passed through as of the last day of the last calendar month prior to the effective date of the amendment promulgated under section 8(a); and

(II) any net crude oil cost increases incurred by a refiner after the effective date of this paragraph, which net crude oil cost increases were not passed through within the 2 calendar months following the calendar month in which such crude oil cost increases were incurred, unless-

(aa) the President finds, and reports to the Congress with respect to such finding, that a passthrough of such crude oil cost increases is necessary to alleviate the impact on refiners, marketers, or consumers of significant increases in costs, to provide for equitable cost recovery consistent with the attainment, to the maximum extent practicable, of the objectives specified in paragraph (1), or to avoid competitive disadvantage; and

(bb) such passthrough in any month of such crude oil cost increases is not in excess of 10 percent of the total amount of such crude oil cost increases as of the end of the calendar month in which the effective date of this paragraph occurs or any month thereafter;

(C) shall provide for the use of the same date in the computation of markup, margin, and posted price for all marketers or distributors of crude oil, residual fuel, and refined petroleum products at all levels of marketing and distribution; and

(D) shall not permit more than a direct proportionate distribution (by volume) to Number 2 oils (Number 2 heating oil and Number 2-D diesel fuel), aviation fuel of a kerosene or naphtha type, and propane produced from crude oil, of any increased costs of crude oil incurred by a refiner; except that the President may, by amendment to the regulation under subsection (a) or by order, permit deviation from such proportionate distribution of costs, if the President finds that refinery operations justify such deviation and further finds that to permit such deviation is consistent with the attainment of the objective in paragraph (1) and would not result in inequitable prices for any class of users of such product.

As used in this paragraph, the term "effective date of this paragraph" means the effective date specified in section 402(b) of the Energy Policy and Conservation Act [see references in text note to this section].

(3) The President in promulgating the regulation under subsection (a) shall give consideration to allocating crude oil, residual fuel oil, and refined petroleum products in a manner which results in making available crude oil, residual fuel oil, or refined ppetroleum products to any person whose use of fuels other than crude oil, residual fuel oil, and refined petroleum products has been curtailed by, or pursuant to a plan filed in compliance with, a rule or order of a Federal or State agency, or where such person's supply of such other fuels is unobtainable by reason of an abandonment of servie permitted or ordered by a Federal or State

agency.

(c) Base period; pro-rata reductions; report to Congress; allocation adjustments; allocation of LPG. (1) To the extent practicable and consistent with the objectives of subsection (b), the mandatory allocation program established under the regulation under subsection (a) shall be so structured as to result in the allocation, during each period during which the regulation applies, of each refined petroleum product to each branded independent marketer, each nonbranded independent marketer, each small refiner and each independent refiner, and of crude oil to each small refiner and each independent refiner, in an amount not less than the amount sold or otherwise supplied to such marketer or refiner during the corresponding period of 1972, adjusted to provide-

(A) in the case of refined petroleum products, a pro rata reduction in distribution of a refined petroleum product if the aggregate amount of such product produced in and imported into the United States is less than the aggregate amount produced in calendar year 1972; and

(B) in the case of crude oil, a pro rata reduction in the amount of crude oil allocated to each refiner if the aggregate amount produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972.

(2)(A) The President shall report to the Congress monthly, beginning not later than January 1, 1974, with respect to any change after calendar year 1972 in -

(i) the aggregate share of nonbranded independenr ,marketers,

(ii) the aggregate share of branded independent marketers, and

(iii) the aggregate share of other persons engaged in the marketing or distributing of refined petroleum products,

of the national market or the regional market in any refined petroleum product (as such regional market shall be determined by the President).

(B) If allocation of any increase of the amount of any refined petroleum product produced in or omported into the United States in excess of the amount produced or imported in calendar year 1972 contributes to a significant increase in any market share described in clause (i), (ii), or (iii) of subparagraph (A), the President shall by order require an equitable adjustment in allocations of such product under the regulation under subsection (a).

(3) The President shall, by order, require such adjustments in the allocations of crude oil, residual fuel oil, and refined petroleum products established under the regulation under subsection (a) as may reasonably be necessary (A) to accomplish the objectives of subsection (b), or (B) to prevent any person from taking any action which would be inconsistent with such objectives.

(4) The President may, by order, require such adjustments in the allocations of refined petroleum products and crude oil established under the regulation under subsection (a) as he determines may reasonably be necessary-

(A) in the case of refined petroleum products (i) to take into consideration market entry by branded independent marketers and nonbranded independent marketers during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of marketing or distribution facilities of such marketers during or subsequent to calendar year 1972, and

(B) in the case of crude oil (i) to take into consideration market entry by independent refiners and small refiners during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of refining facilities of such refiners during or subsequent to calendar year 1972.

Any adjustments made under this paragraph may be made only upon a finding that, to the maximum extnet practicable, only upon a finding that, to the maximum extent practicable, the objectives of subsection (b) of this section are attained.

(5) To the extent practicable and consistent with the objectives of subsection (b) the mandatory allocation program

established under the regulation under subsection (a) shall not provide for allocation of LPG in a manner which denies LPG to any industrial user if no substitute for LPG is available for use by such industrial user.

(d) Gasoline allocation. (1) The provisions of the regulation under subsection (a) respecting allocation of gasoline need not take effect until thirty days after the promulgation of such regulation, except that the provisions of such regulation respecting price of gasoline shall take effect not later than fifteen days after its promulgation.

(2) If–

(A) an order or regulation under section 203 (a) (3) of the Economic Stablization Act of 1970 [12 USCS § 1904 note] applies to crude oil, residual fuel oil, or a refined petroleum product and has taken effect on or before the fifteenth day after the date of enactment ot this Act [enacted Nov. 27, 1973], and

(B) the President determines that delay in the effective date of provisions of the regulation under subsection (a) relating to such oil or product is in the public interest and is necessary to effectuate the transition from the program under such section 203(a)(3) [12 USCS §1904 note] to the mandatory allocation program required under this Act [15 USCS §§ 751 et seq.]

he may in the regulation promulgated under subsection (a) of this section delay, until not later than thirty days after the date of the promulgation of the regulation, the effective date of the prosisions of such regulation insofar as they relate to such oil or pruduct. At the same time the President promulgates such regulation, he shall report to Congress setting forth his reasons for the action under this paragraph.

(e) Entitlements. Any provision of the regulation under subsection (a) of this section–

(1) which requires the purchase of entitlements, or the payment of money through any other similar cash transfer

arrangement, the purpose of which is to reduce disparities in the crude oil acquisition costs of domestic refiners, and

(2) which is based upon the number of barrels of crude oil input, or receipts, or both, of any refiner,

shall not apply to the first 50,000 barrels per day of input, or receipts, or both, of any refiner whose total refining capacity (including the refining capacity of any person who controls, is controlled by, or is under common control with such refiner) did not exceed on January 1, 1975, and does not thereafter exceed 100,000 barrels per day. The preceding sentence shall not affect any provisions of the regulation under subsection (a) of this section with respect to the receipt by any small refiner as defined in section 3(4) [15 USCS §752(4)] of payments for entitlements or any other similar cash transfer arrangement. [1]

(Nov. 27, 1973, P. L. 93-159, §4, 87 Stat. 629; Dec. 5, 1974, P.L. 93-511, 88 Stat. 1608; Sept. 29, 1975, P.L. 94-99, §2, 89 Stat. 481; Nov. 14, 1975, P. L. 94-133 §1, 89 Stat. 694; Dec. 22, 1975, P.L. 94-163; Title IV, Parts A, B, §§401(b)(1), (2), (3), 402(a), 403(a), 451, 89 Stat. 946, 948.)

1/ On June 30, 1980, after the effective date of the Act challenged in this appeal, 15 U.S.C. §753 was amended to read as follows:

(a)-(e) [Unchanged]

(f)(1) If the President finds that there are significant quantities of alcohol available for use in motor fuel that are not being used for that purpose because of an unavailability of crude oil with respect to a refiner or unavailability of gasoline with respect to persons engaged in marketing of petroleum products, the President shall, to the extent practicable and subject to the provisions of this Act [15 USCS §§751 et seq.], use the authorities under subsection (a) to provide for the allocation of—

(A) crude oil to refineries engaged in the production of refined petrpleum products to be mixed with alcohol, and

(B) refined petroleum products to persons engaged in the marketing of petroleum products,

So as to result in the use of such quantities of alcohol in motor fuel.

(2) In exercising such authorities pursuant to this subsection, the President shall —

§757. Oil pricing policy

(a) Amendment to regulation under §753(a), establishing ceiling prices on first sale of crude oil produced in United States. Not later than the first day of the second full calendar month following the date of enactment of this section [enacted Dec. 22, 1975], the President shall promulgate and make effective an amendment to the regulation under section 4(a) of this Act [15 USCS §753(a)] which to the regulation under section 4(a) of this Act [15 USCS §753(a)] which regulation, as amended shall establish ceiling prices (or the manner of determining celing prices) applicable to any first sale of crude oil produced in the United States, such that the resulting actual weighted average first sale price for all such crude oil during such calendar month and each of the 39 nonths thereafter shall not exceed a maximum of $7.66 per barrel (hereinavter in this section referred to as the "maximum weighted average first sale price"), except as may be adjusted pursuant to this section.

(b) Different ceiling prices for different classifications of crude oil; requirements for increase in price of old crud oil production; definition of "old crude oil production".

(1) The regulation under section 4(a) [15 USCS §753 (a)],

1/Continued

(A) seek to avoid disruption of crude oil and refined petroleum product markets and to avoid causing unreasonable increases in the price of alcohol, and

(B) give due consideration to the adequacy of quality control in any refinery operations related to the receipt of an allocation of crude oil

(3) For the purposes of this subsection, "alcohol" means methanol, ethanol, or any other alcohol which is produced from any source and which is suitable for use in combination with other fuels as a motor fuel.

(4) Nothing in this subsection shall limit the allocation authorities under subsection (a). (As amended June 30, 1980, P.L. 96-294, Title II, Subtitle D §274, 94 Stat. 711.)

as amended pursuant to subsection (a) of this section or by any subsequent amendment thereto, may, subject to the limitations related to the maximum weighted average first sale price and other requirements of this section, provide for different ceiling prices (or manner of determining ceiling prices) for different classifications of crude oil produced in the United States. In providing for different ceiling prices (or the manner for determining such ceiling prices) and classifications for such crude oil, the President shall determine that such ceiling prices (or the manner for determining such ceiling prices) and such classifications–

(A) are administratively feasible; and

(B) are justified on the basis that such prices and such classifications are consistent with obtaining optimum production of crude oil in the United States.

(2) No amendment to the regulation under section 4(a) [15 USCS §753(a)] made after the date of enactment of this section [Dec. 22, 1975] may permit, in any month which begins after such date, an increase in the price for any volume of old crude oil production from any priorities, unless the President finds that such amendment–

(A) will give positive incentives for (i) enhanced recovery techniques, or (ii) deep horizon development, from such properties; or

(B) is necessary to take into account declining production from such properties; and

(C) is likely to result in a level of production from such properties beyond that which would otherwise occur if no such amendment were made.

(3) As used in paragraph (2), the term "old crude oil production" means that volume of crude oil produced and sold from a property in a month which is equal to or less than the volume of old crude oil, as defined in section 212.72 of title 10, Code of Federal Regulations (as in effect on November 1, 1975) [see references in text note to this section], produced and sold from such property in the months of September, October, and November of 1975, divided by 3.

(c) Actual and maximum weighted average first sale prices: adjustments to achieve balance.

(1) Not later than 6 months after the effective date of the amendment promulgated under subsection (a), and not later than every 6 months thereafter, the President shall, on the basis of valid and reliable information (which may include information obtained by a valid and reliable sampling technique) of actual first sale prices of domestic crude oil, determine whether and the extent to which the actual weighted average first sale price for crude oil produced in the United States during any 6-month period or portion thereof for which data are available following the effective date of the amendment promulgated under subsection (a) of this section, exceeded or was less than the maximum weighted average first sale price of such crude oil specified in subsection (a) as may be adjusted pursuant to this section.

(2) If the President finds, pursuant to paragraph (1) of this subsection, that the regulation under section 4(a) [15 USCS §753(a)], as amended, resulted in an actual weighted average first sale price in excess of the maximum weighted average first sale price specified in subsection (a) as adjusted pursuant to this section, he shall amend the regulation to make such compensating adjustments as are necessary to result, in a corresponding period, in an actual weighted average first sale price for domestic crude oil sufficient to offset such excess.

(3) If the President finds, pursuant to paragraph (1) of this subsection, that the regulation under section 4(a) [15 USCS §753(a)], as amended, resulted in an actual weighted average first sale price less than the maximum weighted average first sale price specified in subsection (a) as adjusted pursuant to this section, he may, notwithstanding the requirements of this section pertaining to such maximum weighted average first sale price, amend the regulation to make such compensating adjustments in the regulation as are necessary to offset the deficiency in a corresponding period.

(d) Adjustment to maximum weighted first sale price to compensate for inflation or as production incentive; limitations.

(1) The amendment promulgated pursuant to subsection (a) of this section (or any subsequent amendment to the regulation under section 4(a) [15 USCS §753(a)]) may provide for an adjustment to the maximum weighted average first sale price specified in subsection (a), such adjustment to begin no earlier than in the calendar month following the first month the amendment is in effect–

(A) to take into account the impact of inflation as measured by the adjusted GNP deflator; and

(B) as a production incentive;

except that the combined effect of any such adjustments referred to in subparagraphs (A) and (B) shall not result in an increase in the maximum weighted average first sale price in excess of 10 per centum per annum (compounded annually), unless modified pursuant to this section.

(2) As used in this subsection, the term "adjusted GNP deflator" means the first revision of the quarterly percent change, seasonally adjusted at annual rates, of the most recent implicit price deflator for the gross national product which shall be computed and published for each calendar quarter by the Department of Commerce, subject to such additional modification as the President shall make to exclude therefrom any amount which he determines is attributable solely and directly to increases which occur after the date of enactment of this section [Dec. 22, 1975] in prices of imported crude oil, residual fuel oil, or any refined petroleum product resulting from concerted action of two or more petroleum exporting countries.

(3) The adjustment as a production incentive referred to in paragraph (1)(B) may be made only on a finding by the President that such an adjustment is likely to provide positive incentive for–

(A) the discovery or development of high cost and high risk properties (including new wildcat properties, and properties located on the Outer Continental Shelf, properties located north of the Arctic Circle, deep wells and deep horizons in onshore or offshore properties, and properties operated by independent producers);

(B) the application of enhanced recovery techniques to producing properties to obtain a level of production higher than would otherwise occur from those properties but for such adjustment; or

(C) sustaining production from marginal wells.

(e) Adjustments in excess of limitations set in subsec. (d).

(1) Not earlier than 90 days after the effective date of the amendment promulgated under subsection (a) and not earlier than 90 days after the date of any previous submission under this subsection, the President may submit to the Congress, in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act [42 USCS §6421], an amendment to the regulation promulgated under section 4(a) 15 USCS §753(a)] which provides for a combined adjustment limitation in excess of the 10 per centum limitation specified in subsection (d)(1).

(2) Any such amendment shall be accompanied by a finding that a combined adjustment limitation greater than permitted by subsection (d)(1) is necessary to provide a more adequate incentive with respect to the matters referred to in subparagraphs (A), (B), or (C) of subsection (d)(3).

(3) Any such amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act [42 USCS §6421].

(f) Report by President; amendments to regulation.

(1) On February 15, 1977, the President shall submit to the Congress a report containing an analysis of the impact of any amendment adopted pursuant to this section on the economy and on the supply of crude oil, residual fuel oil, and refined petroleum products and an analysis of the effects on price and the production of domestic crude oil resulting from the amendments made to this section by sections 121 and 122 of the Energy Conservation and Production Act [15 USCS §757].

(2) On March 15, 1977, the President may submit with such report to the Congress, in accordance with the procedures specified in section 551 of the Energy Policy and Conservation

Act [42 USCS §6421], an amendment to the regulation promulgated under section 4(a) [15 USCS §753(a)] which–

(A) provides for the continuation of the adjustment as a production incentive (referred to in subsection (d);

(B) provides for a modification of the combined adjustment limitation (referred to in subsection (d), as may have been amended pursuant to subsection (e)); or

(C) provides for adjustments with respect to both subparagraphs (A) and (B).

(3) Such amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act [42 USCS §6421].

(4) If any such amendment is disapproved by either House of Congress, the President may, not later than 30 days after the date of such disapproval, submit one additional amendment in accordance with paragraph (2), which amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act [42 USCS §6421].

(5) If no amendment to continue the adjustment as a production incentive takes effect, no such adjustment to the maximum weighted average first sale price thereafter may be taken into account in computing such price for any month which begins after (A) the date on which a submission could have been made under paragraph (2) but was not, or (B) the last date on which a submission was disapproved and no further submission pursuant to paragraph (4) could be made, except that the President may, pursuant to the procedures under subsection (e), submit an amendment to the regulation to provide for a prospective reinstatement of such adjustment.

(g) Report by President, and amendments regarding positive price incentives for development of domestic crude oil production transported through trans-Alaska pipeline.

(1) On April 15, 1977, the President shall submit to the Congress a report as to whether the regulation promulgated under section 4(a) [15 USCS §753(a)] and in effect on such

date will provide positive price incentives for the development of the domestic crude oil production referred to in paragraph (2)(A) without lessening needed incentives for sustaining or enhancing crude oil production in the remainder of the United States.

(2) If the President determines that a price required to provide positive price incentives for the development of the domestic crude oil production referred to in paragraph (2)(A) would, because of the maximum weighted average first sale price specified in subsection (a) of this section, as adjusted, have the effect of reducing or limiting ceiling prices permitted for crude oil produced in the remainder of the United States to levels which would result in less production of such crude oil than would otherwise occur, the President may, together with such report, or at any time thereafter not earlier than 90 days after any previous submission under this subsection, except as provided in paragraph (4), submit to the Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act [42 USCS §6421] an amendment to the regulation promulgated under section 4(a) [15 USCS §753(a)] which–

(A) excludes up to 2 million barrels a day of crude oil production transported through the trans-Alaska pipeline from the computation of the maximum weighted average first sale price specified in subsection (a); and

(B) establishes ceiling prices (or a manner of determining prices) for the first sale of crude oil production referred to in subparagraph (A) such that the actual weighted average first sale price for such production will not exceed the highest actual weighted average first sale price permitted under the regulation for significant volumes of any other classification of domestic crude oil.

(3) Any such amendment shall be accompanied by such findings and supporting rationale as the President determines justify such ceiling prices (or manner for determining such prices). Any amendment submitted to the Congress pursuant to this subsection shall not take effect if either House of Con-

gress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act [42 USCS §6421].

(4) If any such amendment is disapproved by either House of Congress, the President may not later than 30 days after the date of such disapproval submit one additional amendment in accordance with paragraphs (2) and (3), which amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act [42 USCS §6421].

(5) If any amendment submitted by the President to the Congress pursuant to this subsection becomes effective, such amendment may thereafter be further amended by the President, subject to the procedures and requirements of paragraphs (2) and (3) of this subsection, except that no such further amendment shall be submitted earlier than January 1, 1978, and thereafter no earlier than 90 days after the date of any previous submission made under this paragraph.

(h) Judicial review. In any judicial review of an amendment required by this section to be submitted to the Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act [42 USCS §6421], the reviewing court may not hold unlawful or set aside any such amendment on the ground that any findings made by the President were not adequate to meet the requirements of this section or of subparagraph (A), (E), or (F) of section 706(2) of title 5, United States Code [5 USCS §706(2)(A), (E), or (F)]. (Nov. 27, 1973, P. L. 93-159, §8, as added Dec. 22, 1975, P. L. 94-163, Title IV, Part A, §401(a), 89 Stat. 941.)

(i)Exemption of stripper well production. (1) The first sale price of stripper well crude oil shall be exempt from the regulation promulgated under section 4 of this Act [15 USCS §753] as amended pursuant to the requirements of this section. For the purpose of this section, the President shall include in the computation of the actual weighted average first sale price for crude oil produced in the United States in any month subse-

quent to August 1976 the actual volume of stripper well crude oil produced in the United States in such subsequent month and such actual volume shall be deemed to have been sold at a first sale price equal to $11.63 per barrel plus the difference between the actual weighted average first sale price in August 1976, for crude oil, other than stripper well crude oil, produced in the United States, and the actual average first sale price in such subsequent month of all classifications of crude oil, other than stripper well crude oil, produced in the United States, weighted as if each such classification were produced in such subsequent month in the same proportion as such classification, or the most nearly comparable classification which existed on August 1, 1976.

(2) For the purposes of this subsection, "stripper well crude oil" means crude oil produced and sold from a property whose maximum average daily production of crude oil per well during any consecutive 12-month period beginning after December 31, 1972, does not exceed 10 barrels.

(3) To qualify for the exemption under this subsection, a property must be producing crude oil at the maximum feasible rate throughout the 12-month qualifying period and in accordance with recognized conservation practices.

(4) The President may define terms used in this subsection consistent with the purposes thereof.

(j)Promulgation of amendments; tertiary enhanced recovery techniques. (1) As soon as practicable after the date of enactment of this subsection [enacted Aug. 14, 1976], taking into consideration the greater flexibility provided by the amendments relating to the production incentive adjustment under section 122 of the Energy Conservation and Production Act [15 USCS §757], the President shall promulgate such amendments to the regulation under section 4(a) [15 USCS §753(a)] (relating to price) as shall (A) provide additional price incentives for bona fide tertiary enhanced recovery techniques and (B) provide for the adjustment of differentials in ceiling prices for crude oil that are the result of gravity differentials which are arbitrary, discriminatory, applied on a regional or local basis without reasonable justification, or fail substantially to reflect

current relative market valuations of such differentials.

(2) As used in this subsection, the term "tertiary enhanced recovery techniques" means extraordinary and high cost enhancement technologies of a type associated with tertiary applications including, to the extent that such techniques would be uneconomical without additional price incentives, miscible fluid or gas injection, chemical flooding, steam flooding, microemulsion flooding, in situ combustion, cyclic steam injection, polymer flooding, and caustic flooding and variations of the same. The President shall have authority to further define the term by rule.

(As amended Aug. 14, 1976, P. L. 94-385, Title I, Part B, §§121, 122, 90 Stat. 1132.)

APPENDIX N

STIPULATION OF THE PARTIES

In the trial court Appellants (Plaintiffs below) and Defendant stipulated to the following facts with respect to the contracts involved herein:

> 2. As of September 1, 1979, and at the present time, each of Plaintiffs was and is a party to several contracts pertaining to oil and gas produced in Alabama which contain provisions stating that the other parties shall pay, or reimburse Plaintiff for, certain production, severance, gathering, occupation or similar taxes. An example of these contracts is an Oil, Gas and Mineral Lease dated March 16, 1971, between The Louisiana Land and Exploration Company, as Lessee, and T. R. Miller Mill Company, Inc., as Lessor, a copy of which is attached hereto as Exhibit "A". At paragraph 3.9.3 thereof, the following provision appears:
>
> > Lessor shall bear and pay, and there shall be deducted from the royalties due hereunder, Lessor's proportionate royalty share of:
> >
> > (a) All applicable severance, production and other such taxes levied or imposed upon production from the leased premises.
>
> Another example is a Gas Purchase Contract dated February 15, 1971, as amended, between Humble Oil and Refining Company, Exxon Corporation's predecessor, as Seller and Florida Gas Transmission Company, as Buyer, a copy of which is attached hereto as Exhibit "B". Paragraph VI(2) thereof is illustrative of provisions

in other similar contracts requiring other parties to reimburse Plaintiffs for any increase in prodution, severance, gathering, occupation or similar taxes. Paragraph VI(2) reads as follows:

> Any sales, transactions, occupations service, production, severance, gathering transmission, export or excise tax, assessment or fee levied, assessed or fixed by the United States or any State or other governmental authority and taxes of a similar nature or equivalent in effect (not including income, excess profits, capital stock, franchise, or general property taxes) in addition to or greater than those, if any being thereof levied, assessed, or fixed on the date of execution hereof, in respect of or applicable to all the natural gas to be delivered by Seller to Buyer underunder (sic) and which Seller may be liable for during any month either directly or indirectly through any obligation to reimburse others, are hereinafter collectively referred to as "additional taxes." It is expressly understood and agreed between the parties that so long as the additional tax shall be in effect Buyer shall reimburse Seller for such additional tax. In the event all or any part of such liability of Seller is not determined or not determinable by the end of any month, then such additional amount required in respect to such liability not determined or determinable shall be set forth for all such months in any calendar year and a statement to be rendered by Seller to Buyer by April 1st of the following year and Buyer shall pay the amount

due pursuant to such statement on or before May 1st of such following year.

Another example is a Casinghead Gas contract dated July 25, 1967, between Cities Service Oil Company, as Purchaser, and Gulf Oil Corporation, on behalf of Sellers, a copy of which is attached hereto as Exhibit "C". Paragraph 9.1 thereof reads as follows:

> All production, severance, gathering, processing and other taxes (ad valorem taxes, Citronelle City Tax and Sales and Use Taxes excepted) relating to the gathering of Casinghead Gas and Extraction and sale of plant products from the Casinghead Gas sold hereunder and to the gathering and sale of residue gas shall be borne by Seller and Purchaser in the same proportions respectively that the parties from time to time share the proceeds from the sale of plant products derived from the processing of the Casinghead Gas in the plant, and residue gas.

3. A substantial portion of Plaintiff's oil and gas production is sold in interstate commerce to Purchasers who are not consumers of oil and gas. Some of such purchasers, in turn, have sales contracts with others that provide for pass through of severance taxes.

Trial Transcript p. 1371-74.

APPENDIX O

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES OF APPELLANTS

Pursuant to Rule 28.1 of the Rules of the Supreme Court, the Appellants herein provide the following lists naming their parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

Exxon Corporation

Exxon Corporation lists the following subsidiaries and affiliates whose stock or debt securities are publicly traded in the United States or Canada: Exxon Pipeline Company; Imperial Oil Limited; Reliance Electric Company.

Gulf Oil Corporation

Gulf Oil Corporation lists the following subsidiaries and affiliates: Afran Bahamas Limited Marine Dept.; Alberta Products Pipe Line Ltd.; Allied-General Nuclear Services; American Heavy Lift Shipping Company; Asia Polymer Corporation; A/S Jargul; A/S Jargul and Co. K/S; Australian Gulf Oil Company; Balinesian Gulf Oil Ltd.; Britama Tankers Limited; Cabinda Gulf Oil Company; China Gulf Plastics Corporation; Canada Systems Group (EST) Limited; Carboquimica, S.A. Ltd.; China Gulf Oil Company, Ltd.; China Gulf Plastics Corporation; Colonial Pipeline Company; Compania Petrolera Aquarico, S.A.; Compagnie D'Investments Pour Les Combustibles De Reacteurs a Haute Temp; Coser, S.A.; Eastern Gulf Oil Company, Ltd.; Eastern Venezuela Gas Transport Company; Ethylene Pijpleiding Maatschappij (Belgium) S.A.; Ethylene Pijpleiding Maatschappij (Nederland) B.V.; Explorer Pipeline Company; Gaelic Oil Co. Ltd.; G & C Realty Limited; General Atomic Company; General Atomic Europe-G.m.b.H.-Zurich; Gulf Canada, Ltd.; Gulf-Dravo Systems Corporation;

Gulf Ecuatoriana de Petroleo, S.A.; Gulf Italia Production Co. S.p.A.; Gulf Italiana SpA; Gulf Oil A/S; Gulf Oil (Belgium) S.A.; Gulf Oil Chemicals Company Asia Limited; Gulf Oil Company (Nigeria) Ltd.; Gulf Oil Company of Gabon; Gulf Oil Company (Portugal) Limited; Gulf Oil Company South Asia; Gulf Oil Egypt, Ltd.; Gulf Oil (Great Britain) Ltd.; Gulf Oil (Ireland) Ltd.; Gulf Oil (Luxembourg) S.A.; Gulf Oil Pakistan Ltd.; Gulf Oil Refining Ltd.; Gulf Oil Sales, Inc.; Gulf Oil (Switzerland); Gulf Oil Trading GmbH; Gulf Oil Trading Investments Limited; Gulf Oil Zaire S.a.R.L.; Gulf Oman Petroleum Ltd.; Gulf-Preload Structures Inc.; Gulf Supply and Distribution Co. Ltd.; Gulf (U.K.) Offshore Investments Limited; Harshaw Cabo & Cia, S.A.; Harshaw Chemie S.a.R.L.; Harshaw Galvanotechnia S.A.; Harshaw Quimics Ltda.; Hochtemperature Reaktorbau G.m.b.H.; Hutchinson Island Limited Partnership; Ico Pintures, S.A.; Industrial Vencedor S.A.; Interquimics S.A.; INSCO Holding and Finance Company N.V.; INSCO Limited; Java Gulf Ltd.; Keydril Ltd.; Keydril (Nigeria) Ltd.; Key International Drilling Co. Limited; Key Perfuracoes Maritimas, Ltd.; Korea Oil Corporation; Kupan Emirates Company Ltd.; Kupan Financial Company (Rotterdam) B.V.-Minerals Branch; Kuwait Oil Company Limited; Laurel Pipe Line Company; London Oil Refining Company Limited; Mid-Atlantic Chemical Corp. S.A.; Midcaribbean Investments Ltd.; Midwest Carbide Corporation; Millmaster Onyx (Canada) Ltd.; Millmaster Onyx G.m.b.H.; Montreal Pipe Line Company Limited; Mozambique Gulf Oil Company; Okinawa Sekiyu Company, Ltd.; Okinawa Terminals Co., Ltd.; Oklahoma Nitrogen Company; Panindustrial, S.A.; Peace Pipe Line, Ltd.; Pembroke Cracking Company; Permaping, S.A.; Petroleo Gulf de Brazil Limitada; Petroleos Gulf de Guatemala, S.A.; Plaschem International Company (Hong Kong) Ltd.; Plastigama, S.A.; Productos Quimicos Somox, Ltda.; Project Baltic; Propet Company Ltd.; Raffinerie de Cressier S.A.; Rimbey Pipe Line Co., Limited; Rio Blanco Oil Shale Partnership; Sarni S.p.A.; Silvertown Lubricants Limited; Sociedad Anonima Espanola de Lubrificantes; Societe de Combustible Pour Reacteurs a Haute Temp.; South Pacific Gulf Oil

Company; Spanish Gulf Oil Company; Spencer Quimica Mexicana S.A. de C.V.; Sultron Ltd.; Sulzer General Atomic Waermetauscher; Taita Chemical Corporation; Trans Northern Pipe Line Company; Venezuela Gulf Refining Company; West Texas Gulf Pipe Line Company; Western G.M.C. Pontiac Buick Ltd.

The Louisiana Land and Exploration Company

The Louisiana Land and Exploration Company lists the following subsidiaries and affiliates: Bull Mountain Coal Company; Candex Development, Ltd.; CL&E Corporation; Iberian Petroleum Company of Angola, Ltd.; Industrial Utilities Service, Inc.; Jacintoport Corporation; Kalua Koi Corporation; LL&E Australia, Inc.; LL&E Canada, Ltd.; LL&E Coal, Inc.; LL&E Colombia, Inc.; LL&E Dubai, Inc.; LL&E Egypt, Inc.; LL&E Espana, Inc.; LL&E Ethiopia, Inc.; LL&E (Europe, Africa, Middle East) Inc.; LL&E Ghana, Inc.; LL&E Honduras, Inc.; LL&E, Inc.; LL&E Indonesia, Inc.; LL&E International, Inc.; LL&E Kenya, Inc.; LL&E Mining, Inc.; LL&E (Netherlands) Inc.; LL&E Netherlands Petroleum Company; LL&E Peru, Inc.; LL&E Petroleum Resources International, Inc.; LL&E Pipeline Corporation; LL&E Suez, Inc.; LL&E Tunisia, Inc.; LL&E (U.K.) Inc.; Louisiana Land Offshore Exploration Company, Inc.; Molokai Public Utilities, Inc.; Mosco, Inc.; Natural Resources, Inc. of LL&E; South Louisiana Land Company, Ltd.; Sun Fire Coal Company; Swamplands, Inc.; Warrior River Coal Company; Westport Utilities System Company; CR Exploration Company; Copper Range Company; Unlimited Development Inc.

Joint Appendix

No. 81-1020 and 81-1268

Office Supreme Court, U.S.
FILED
JUL 1 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EXXON CORPORATION, GULF OIL CORPORATION AND THE LOUISIANA LAND AND EXPLORATION COMPANY,
Appellants,

v.

RALPH EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, et al.,
Appellees.

EXCHANGE OIL AND GAS CORPORATION, et al.,
Appellants,

v.

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,
Appellee.

Appeal From the Supreme Court of Alabama

JOINT APPENDIX

[Counsel of Record Shown On Inside Front Cover]

APPEAL FOR NO. 81-1020 DOCKETED DECEMBER 2, 1981.
APPEAL FOR NO. 81-1268 DOCKETED JANUARY 7, 1982.
PROBABLE JURISDICTION NOTED MAY 17, 1982.

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No. 81-1020 and 81-1268

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EXXON CORPORATION, GULF OIL CORPORATION AND THE LOUISIANA LAND AND EXPLORATION COMPANY,

Appellants,

v.

RALPH EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, et al.,

Appellees.

EXCHANGE OIL AND GAS CORPORATION, et al.,

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v.

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,

Appellee.

Appeal From the Supreme Court of Alabama

JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

[IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA]

DATE	ACTION	
10-17-79	Complaint filed by Exchange Oil and Gas Corp.	[CV-79-1284]
11-01-79	Complaint filed by Getty Oil Oil Co.	[CV-79-1363]
11-07-79	Complaint filed by Union Oil Co.	[CV-79-1383]
12-10-79	Complaint filed by Exxon Corp.	[CV-79-1529]
1-02-80	Complaint filed by Gulf Oil Corp.	[CV-79-1622]
1-04-80	Complaint filed by Louisiana Land & Exploration Co.	[CV-80-006]
1-23-80	All severance tax cases consolidated.	
1-30-80	Second Exxon Complaint filed.	[CV-80-121]
2-14-80	Second Exchange Oil and Gas Complaint filed.	[CV-80-224]

DATE	ACTION	
2-14-80	Second Union Oil Complaint filed.	[CV-80-226]
2-14-80	Second Getty Oil Complaint filed.	[CV-80-225]
3-07-80	Second Louisiana Land & Exploration Complaint filed	[CV-80-351]
3-19-80	Third Exxon Complaint filed.	[CV-80-421]
4-01-80	Second Gulf Complaint filed.	[CV-80-509]
4-15-80	Third Getty Oil Complaint filed.	[CV-80-565]
4-15-80	Third Union Oil Complaint filed.	[CV-80-566]
4-15-80	Third Exchange Oil and Gas Complaint filed.	[CV-80-568]
5-09-80	Third Louisiana Land & Exploration Co. Complaint filed.	[CV-80-714]
6-12-80	Opinion and Order filed: It is Ordered, Adjudged and Decreed by the Court that Act 434, 19/9 Session Ala. Legislature, be and the same is hereby declared to be null, void and unconstitutional in all respects and of no further force or effect.	

DATE	ACTION	
	It is ordered, Adjudged and Decreed by the Court that each of the Plaintiffs herein is entitled to a refund of the taxes paid by them under and pursuant to the provisions of Act 434 and the Defendant is hereby ordered to pay and refund to each of them the amounts so paid by each of said Plaintiffs, with costs of court herein to be taxed against the Defendant. Appropriate judgment will be entered in each case and the parties are directed to confer among themselves in an attempt to agree upon the amount to be refunded and report to the Court within 10 days. The Court retains jurisdiction in the event the parties are unable to agree upon the amount of refund. This 12th day of June, 1980.	
6-17-80	Amendment to Opinion and Order filed.	
6-30-80	Final Judgment and Decree entered.	[CV-79-1284, CV-80-224, CV-80-568]
6-30-80	Final Judgment and Decree entered.	[CV-79-1363, CV-80-226, CV-80-565]
6-30-80	Final Judgment and Decree entered.	[CV-79-1383, CV-80-225, CV-80-566]

DATE	ACTION	
6-30-80	Final Judgment and Decree entered.	[CV-79-1529, CV-80-121, CV-80-421]
6-30-80	Final Judgment and Decree entered.	[CV-79-1622, CV-80-509]
6-30-80	Final Judgment and Decree entered.	[CV-80-066, CV-80-351, CV-80-714]
7-22-80	Amendment to Final Judgment and Decree	[CV-79-1622, CV-80-509]
7-28-80	Amendment to Final Judgment and Decree.	[CV-79-1529, [CV-80-121, CV-80-421]
7-28-80	Amendment to Final Judgment and Decree.	[CV-80-006, CV-80-351, CV-80-714]
7-30-80	Notice of Appeal to Alabama Supreme Court, Designation of Record filed with $50.00 filing fee.	
7-10-81	Reversed and Remanded by Appellate Court.	
9-04-81	Application for rehearing overruled.	
9-30-81	Judge's order after remand.	

DATE	ACTION

[IN THE SUPREME COURT OF ALABAMA]

DATE	ACTION
7-30-80	Notice of Appeal from the Circuit Court of Montgomery County filed.
7-10-81	Reversed and Remanded.
9-04-81	Application for rehearing overruled.
11-23-81	Notice of Appeal to the United States Supreme Court filed by Exxon Corporation, Gulf Oil Corporation and the Louisiana Land & Exploration Co.
11-25-81	Notice of Appeal to the United States Supreme Court filed by Exchange Oil and Gas Corporation, Getty Oil Company and Union Oil Company.

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

MAILING ADDRESS:
P.O. Box 157
Montgomery Alabama 36101

TELEPHONE: 832-6480

September 4, 1981

Re: 79-832

RALPH P. EAGERTON, Jr., as Commissioner, etc.
Appellant

vs.

Exchange Oil and Gas Corporation, et al
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Application for rehearing overruled. No opinion written on rehearing.

/s/ J. O. Sentell
Clerk, Supreme Court of Alabama

July 10, 1981

THE STATE OF ALABAMA - - - -JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM - 1981

Ralph P. Eagerton, Jr.,
as Commissioner of Revenue
of the State of Alabama

v.

Exchange Oil and Gas Corporation, et al.
Appeal from Montgomery Circuit Court

79-823

BEATTY, JUSTICE.

Fourteen oil and gas producers filed similar suits challenging the constitutionality of Act No. 79-434, approved by the Alabama Legislature in its 1979 Regular Session, and seeking refunds of oil and gas severance taxes paid pursuant to the Act. The trial court held the Act to be unconstitutional. Ralph P. Eagerton, Jr., as Commissioner of Revenue, appealed. We reverse and remand.

Before the legislature enacted Act No. 79-434, the statute governing the amount of oil and gas severence tax was Code of 1975, §40-20-2. That section in its relevant part read:

> (a) There is hereby levied, to be collected hereafter, as herein provided, annual privilege taxes upon every person engaging or continuing to engage within the state of Alabama in the

business of producing or severing oil or gas as defined herein from the soil or the waters, or from beneath the soil or the waters, of the state for sale, transport, storage, profit or for use. The amount of such tax shall be measured at the rate of five percent of the gross value of said oil or gas at the point of production until October 1, 1973, at which time the rate of such tax shall decrease to four percent, which shall be the applicable rate thereafter.

(b) The tax is hereby levied upon the basis of the entire production in this state, including what is known as the royalty interest, on which production the amount of such tax shall be a lien, regardless of the place of sale or to whom sold, or by whom used, or the fact that the delivery may be made to points outside the state; and the tax shall accrue at the time such oil or gas is severed from the soil or the waters, or from beneath the soil or the waters, and in its natural, unrefined or unmanufactured condition.

Code of 1975, §40-20-8, dealt with the allocation and distribution of the taxes collected.

The caption of Act No. 434 states that its purpose is: "To amend Code of Alabama 1975, Sections 40-20-2 and 40-20-8, so as to increase the rate of tax; to provide further for the distribution of the proceeds of the tax; and to provide certain exemptions from the increased rate." Section 1(a) of Act 79-434 provides:

Code of Alabama 1975, §40-20-2, is amended to read as follows:

"§40-20-2. (a) There is hereby levied, to be collected hereafter, as herein provided, annual privilege taxes upon every person engaging or

continuing to engage within the State of Alabama in the business of producing or severing oil or gas as defined herein, from the soil or the waters, or from beneath the soil or the waters, of the state for sale, transport, storage, profit, or for use. The amount of such tax shall be measured at the rate of six per centum of the gross value of said oil or gas at the point of production. All wells producing less than 26 barrels of oil per day shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production. All wells that come into production after the effective date of this Act shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production for a period of ten years after production begins. Ten years after production begins, such tax shall be then imposed at the rate of six per centum (6%) on such wells that go into production after the effective date of this Act. Provided, however, that said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation. . . ."

The primary issue in this appeal deals with the effect of the phrase which reads "said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation," (hereinafter the smackover provision) in Act No. 79-434.

Code of 1975, §40-20-2 had previously imposed a 4% severance tax on statewide oil and gas production. The commissioner contends that Act No. 79-434, the amendatory Act, was intended to increase that rate from 4% to 6% statewide. The appellees, however, urge that because of the inclusion of

the sentence which reads "said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation," the entire Act was intended only to impose an increase on the wells which were producing oil and gas from the smackover formation at the depth specified.

It is undisputed that the smackover formation underlies only twelve counties in Alabama and that that is an unchanging fact. It is also clear that at the time of the passage of the Act, the only production in the smackover formation from 15,000 to 15,800 feet in Alabama was in Escambia County. Thus the appellees urge that the increase from 4% to 6% was intended only to apply to those wells in the smackover formation at that depth, all of which were in Escambia County. Since the Act as so interpreted would only apply to one county, appellees contend that it is a local Act.

In *Town of Loxley v. Rosinton Water, Sewer and Fire Protection Authority, Inc.*, Ala., 376 So. 2d 705 (1979) this Court said:

> In interpreting statutes the underlying consideration, always, is to ascertain and effectuate the intent of the legislature as expressed in the statutes. *Employees' Retirement System of Alabama v. Head*, 369 So.2d 1227 (Ala. 1979). While specific language used by the legislature is subject to explanation, such language cannot be detracted from, or added to. *May v. Head*, 210 Ala. 112, 96 So. 869 (1923). Furthermore, when the language of a statute is clear and unambiguous there is no room for judicial construction. *Employees' Retirement System of Alabama v. Head*, supra. . . . The purpose of interpretation is not to improve a statute but rather to explain the express language used

in the statute. *Lewis v. Hitt*, 370 So. 2d 1369 (Ala. 1979).

The appellant contends that the language of the smackover provision, which reads, "***said additional increase*** shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation" (emphasis added), should properly be construed by reading that provision in conjunction with the sentence immediately preceding it. The preceding swntence limits the increase on wells that go into production after the effecgive date of the Act to 4% for a period of ten years and then provides that after ten years it shall be raised to 6%. By reading the two sentences together, appellant urges that the smackover provision would refer only to the increase from 4% to 6% on new wells after a ten-year moratorium and to the statewide severance tax increase from 4% to 6%. In other words, the appellant urges that the smackover provision requires that new wells will all be taxed at a rate of 4% for ten years, and then there shall be an increase to 6% on those new wells in the smackover formation at the depth specified. According to the appellant, the smackover provision was not intended to limit the entire Act so that wells in the smackover formation at that depth were the only ones to be taxed at a rate of 6%.

The manifested intent of the legislature, as stated in the Act itself, was to levy this tax upon "every person engaging or continuing to engage within the State of Alabama in the business of producing or severing oil or gas. . . ." This a clear and unambiguous statement that the legislature intended for the tax increase to apply statewide. Moreover, Act No. 79-434 specifically replaces and amends Code of 1975, §40-20-2 which imposed a 4% severance tax statewide. If this Act were interpreted as applying only to those wells in the smackover formation at the specified depth, and only in Escambia County, there would be no provision for taxing the rest of the state. Certainly that was not the intent of the legislature.

After a careful reading of the Act, we are convinced that the smackover provision should logically be read in conjunction with the preceding sentence and should only be construed as a limitation on the taxing of new wells. Although the appellees put forth various forms of extrinsic evidence, some of which was clearly inadmissible, in order to prove the intent of the legislature, the general rule is that when the intent of the legislature can be determined from the language of the statute itself, we do not need to resort to extraneous matters to determine the legislative intent. "Courts can only learn what [the] Legislature intended by what it has said, and have no right to stray into mazes of conjecture or search for an imaginary purpose, in construing [a] statute." ***Alabama Industrial Bank v. State ex rel. Avinger***, 286 Ala. 59, 237 So. 2d 108 (1970). We are thus compelled to find that the smackover provision was not intended by the legislature to be a limitation which affected the entire Act.

The trial court held that because of the inclusion of the smackover provision Act No. 79-434 was a local Act. This decision was apparently based on the authority of ***Peddycoart v. City of Birmingham, Ala.***, 354 So. 2d 808 (1978) in which this Court held that if at the time legislation was adopted it applied to any political subdivision less than the whole state, it was a local Act.

Since we interpret the smackover provision as being a limitation on the taxing of new wells, and not as a limitation on the entire Act, we find that Act No. 79-434 is one which in its terms and effects applies to the whole state. Not only does the Act impose an increased severance tax on the production of oil and gas statewide, but the smackover provision itself applies statewide by giving a statewide incentive to create new wells except in the smackover formation at a depth of 15,000 to 15,800 feet. Accordingly, Act No. 79-434 is a general law.

Based on the erroneous determination that Act No. 79-434

was a local law, the trial court held that Act No. 79-434 violated Section 106 of the Alabama Constitution because it was not published or posted as required by that section for local laws, that it violated Section 111 of the Alabama Constitution because Act No. 79-434 had been introduced as a general law and amended so as to be a local law on passage, and violated Section 105 of the Alabama Constitution because Act No. 79-434 was a local law which dealt with a subject covered by a general law. Since we have determined that Act No. 79-434 is a general law, there can be no conflict with any of these sections and we need not discuss these arguments in depth.

> Act No. 79-434, Section 1(d) (e), reads as follows:
>
> Any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefore. (e) The privilege tax herein levied shall be absorded and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.

The trial court held that because of the above-quoted royalty owner exemption and pass-through prohibition, Act No. 79-434 lacked uniformity and established arbitrary classifications in violation of the equal protection and due process clauses of the federal and state constitutions.

The appellees urge that there was no reasonable ground for exempting royalty owners from the increase and thus that the trial court correctly found the classification to be arbitrary.

They contend that because Code of 1975, §20-20-1(8) includes royalty owners within the definition of the term "producers," the tax is being imposed unequally within the class of producers. This, they urge, is especially true since the pass-through prohibition precludes producers from passing the tax on to the consumers.

In *Haden v. Watson*, 270 Ala. 277, 117 So. 2d 694 (1960) this Court discussed the power of the legislature to establish classifications for the purpose of license and excise taxes. There it was said:

> The legislature has the broadest range and power in establishing classifications or subclassifications for the purpose of license and excise taxes. State v. Pure Oil Co., 256 Ala. 534, 55 So. 2d 843. Further the legislature in classifying subjects for taxation is not required to state the grounds for classification. State v. Pure Oil Co., supra. . . .
>
> Furthermore particular privileges, occupations, classes or subclasses of businesses may be licensed and taxed and other privileges, occupations or businesses need not be included and can be entirely exempt therefrom. Henry v. Shevinsky, 239 Ala. 293, 195 So. 222; State v. Pure Oil Co., supra.
>
> In other words the classification of occupations and privileges for taxation is largely a matter of legislative discretion, and it will not be interfered with by the courts as being in violation of the rules of equality and uniformity unless it is palpably arbitrary and unreasonable and unless there is no conceivable state of facts which would support it. State v. Pure Oil Co., supra; Carmichael v. Southern Coal

& Coke Co., 301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A.L.R. 1327; Frazier v. State Tax Commission, 234 Ala. 353, 175 So. 402, 110 A.L.R. 1479,

In the instant case the legislature sought to exclude royalty owners from the increase in the severance tax. Admittedly royalty owners are a subclass of producers under Code of 1975, §40-20-1(8); however in ***Haden, supra,*** we noted that a distinction in the imposition of taxes can be made between subclassifications. Such a distinction will not be interfered with unless there is no conceivable set of facts to support it. Here it is conceivable that the exclusion of royalty owners from this increase in tax could encourage the development of new oil and gas wells. There being a conceivable reason to support the distinction, the legislative enactment should not be deemed arbitrary and should be upheld.

Similarly the trial court held the smackover provision to be an arbitrary and unconstitutional classification because the increase was limited only to the production from the depth of 15,000 to 15,800 feet. Since the legislature could have intended to encourage oil and gas production in other parts of the state and in other layers of the earth we find this to be a reasonable distinction and hold this provision was not unconstitutional for this reason either.

The trial court also held that because of the royalty owner exemption and the pass-through prohibition, Act No. 79-434 was unconstitutional in that it impaired contractual obligations. The contractual obligations in question were leases which required royalty owners to pay their share of severance taxes, and sales contracts which required the purchasers to reimburse the plaintiffs for tax increases. The United States Supreme Court faced a similar situation in *Barwise v. Sheppard*, 299 U.S. 33, 57 S. Ct. 70, 79 L. Ed. 637 (1936) where it was said:

> Plainly no stipulation in the lease can be of any avail as against the power of the State to impose the tax, prescribe who shall be under a duty to the State to pay it, and fix the time and mode of payment. And this is true even though it be assumed to be admissible for the lessors and the lessee to stipulate as to who, as between themselves, shall ultimately bear the tax. . . .

Thus it is clear that parties to a private contract cannot limit a state's ability to levy taxes. This was recognized by the Alabama Supreme Court in *McPhillips Mfg. Co. v. Curry*, 241 Ala. 366, 2 So. 2d 600 (1941) where it was said:

> The existence of an executory contract between or among two or more individuals presents no obstacle to the right or power of the State to levy or impose a tax which may adversely affect the financial interest of either or any of the parties which may have been acquired under or by reason of the mutual covenants of such parties to the contract. . . .

Thus, although one party to the contracts involved here may receive less than anticipated as a result of Act No. 79-434, such a decrease does not amount to an impairment of the contracts. The legislature must retain the authority to tax free from interference by the contracts of private persons. Act No. 79-434 does not unconstitutionally impair the contracts of the parties.

The trial court determined that Act No. 79-434 was an unconstitutional burden on interstate commerce and thus violated the United States Constitution. Specifically the trial court found that the pass-through prohibition violated Article I, Section 8, Clause 3 of the U.S. Constitution because Congress had preempted the field which the pass-through prohibition attempted to address. The trial court held that the Natural

Gas Policy Act of 1978, codified at 15 U.S.C. §§ 3301-3432, prevented the legislature from mandating that the increased severance tax could not be passed on by the producers.

The Natural Gas Policy Act established maximum lawful prices at the wellhead for all sales of natural gas. That Act in Section 3320 reads:

> [A] price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extent necessary to recover (1) state severance taxes attributable to the production of such natural gas and borne by the seller. . .

Nowhere in that section is it stated that the oil companies are entitled to "pass-through" increases on state severance taxes. Rather, the Act merely provides that the lawful ceiling on the first sale at the wellhead may be raised if a severance tax is imposed by the states. The two Acts are aimed at entirely different purposes. In other words, although it would be perfectly permissible for the oil and gas companies to raise the price for the first sale of natural gas, subject to the limitations of the Natural Gas Policy Act, all that Act No. 79-434 requires is that the increase in severence tax mandated by that Act be borne by the producer or severer of the oil or gas. Thus the pass-through prohibition contained in Act No. 79-434 does not conflict with the Natural Gas Policy Act of 1978, and the trial court's finding to that effect is due to be reversed.

The trial court declared that Act No. 79-434 was unconstitutional because it violated Section 45 of the Alabama Constitution of 1901 which provides that "[e]ach law shall contain but one subject which shall be clearly expressed in the title. . . ."

The title to Act No. 79-434 reads as follows:

> To amend Code of Alabama 1975, Sections 40-20-2 and 40-20-8, so as to increase the rate of tax; to provide further for distribution of the proceeds of the tax; and to provide certain exemptions from the increased rate.

The trial court declared that Act No. 79-434 covered more than one subject and that the title did not clearly express the subjects of the Act. Specifically the trial court found that the title did not make any reference to the following topics:

1. The purported consumer protection and/or pricing regulation in form of the prohibition against pass through contained in Section 1(e).

2. The provision requiring the "producer or severer" to absorb and pay the tax.

3. The extent of the increase of the tax.

4. The fact that the Act imposed differing tax rates on different production.

5. That producers would be required to bear the royalty owner's share of the tax.

6. The fact that the tax is not based on ownership of the mineral interest.

7. That purchasers would be prohibited from accounting for and paying the tax in derogation of the provisions of Section 40-20-3.

The purpose of Section 45 has generally been said to be to sufficiently disclose the subject of the Act so as to apprise the legislature and the public of the matter to be legislated therein. ***Bozeman v.Conecuh County Board of Education***, 282 Ala. 543, 213 So. 2d 388 (1968).

In ***Boswell v. State***, 290 Ala. 349, 276 So. 2d 592 (1973) this Court quoting ***Pallentyne v. Wickersham***, 75 Ala. 533 (1883), stated the rules governing the application of Section 45. There it was said:

> "[T]he title of a bill may be very general, and need not specify every clause in the statute. Sufficient if they are all referable, and cognate to the subject expressed. And when this subject is expressed in general terms, every thing which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is included in, and authorized by it." . . .

In this case we find that the title of the Act was sufficient to meet the requirements of Section 45. The seven provisions which the trial court found not to be included in the title are provisions which are necessary to make the enactment complete or at least are provisions which result as a complement of the thought contained in the general expression of the title. Therefore we hold that Act No. 79-434 does meet the requirements of Section 45.

The trial court held that Act No. 79-434 was "so vague, uncertain, indefinite, ambiguous, and conflicting with and repugnant to other existing provisions of other statutes that it cannot be enforced on any rational basis and, therefore, must be stricken." While we recognize that courts have the power to declare legislative enactments inoperative and void for indefiniteness or uncertainty, that power should only be

exercised when the statute is so incomplete, or irreconcilably conflicting, or so vague and indefinite, that it cannot be executed, and the court is unable to determine with any reasonable degree of certainty what the legislature intended. ***Jansen v. State ex rel. Downing***, 273 Ala. 166, 137 So. 47 (1962). We do not find this Act to be so defective.

Moreover, we note that in construing statutes courts must presume that statutes are constitutional and should not hold them unconstitutional unless they are convinced beyond a reasonable doubt of their unconstitutionality. ***Alabama Dairy Commission v. Food Giant, Inc.***, Ala., 357 So. 2d 139 (1978).

In ***Brittain v. Weatherly***, 281 Ala. 683, 207 So. 2d 667 (1968), quoting ***State ex rel. Montgomery v. Merrill***, 218 Ala. 149, 117 So. 473 (1928), this Court said:

> "It is a well-recognized rule that it is the duty of the court to uphold a law when it is fairly susceptible of two interpretations, one of which maintains its constitutionality and the other strikes it down, though the adoption of the former be the less natural. . . ."

For this reason we find that the statute is not void for indefiniteness or uncertainty.

Since we have determined that the provisions of Act No. 79-434 are constitutional, we do not need to address the question of whether the severability clause should have been used by the trial court to save this Act or portions thereof.

On the same day the trial court rendered the final order in this case, it granted partial summary judgment in favor of plaintiffs Warrior Drilling and Engineering Company, Inc., Pruet Production Company and Anderman Operating Company

under the "26 barrel provision" of Act No. 79-434, which provides that "All wells producing less than 26 barrels of oil per day shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production." The trial judge specifically found that the exemption in the Act refers to both oil or gas production. The trial court's order granting the partial summary judgments stated:

> Since the language of the exemption from the face of the Act is clear and unequivocal, and each of these Plaintiffs have proven that ***only one or two of their wells at most produce more than 26 barrels*** of oil per day, said Plaintiffs Warrior Drilling and Engineering Co., Inc., Pruet Production Company and Anderman Operating Company are entitled to judgment. [Emphasis added.]

While we agree that the exemption in the Act refers to all wells producing either oil or gas, the trial court's order granting partial summary judgment is illogical. Since the trial court recognizes that one or two of the plaintiffs' wells do produce more than 26 barrels of oil, it was improper to hold that Act No. 79-434 did not apply to those plaintiffs. For that reason the motion for partial summary judgment was improperly granted.

For the above reasons we hold that Act No. 79-434 was valid in its entirety and the order of the trial court must be and is hereby reversed and remanded.

REVERSED AND REMANDED.
All the Justices concur.

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

EXCHANGE OIL AND GAS CORPORATION,
Plaintiff,

VS.

RALPH EAGERTON, Commissioner of Revenue of the State of Alabama,
Defendant.

CV-79-1284-H
and

CV-79-1362-H	CV-80-168-H	CV-80-564-H
CV-79-1363-H	CV-80-121-H	CV-80-565-H
CV-79-1397-H	CV-80-421-H	CV-80-566-H
CV-79-1529-H	CV-80-863-H	CV-80-567-H
CV-79-1338-H	CV-80-351-H	CV-80-568-H
CV-79-1583-H	CV-80-714-H	CV-80-569-H
CV-79-1622-H	CV-80-509-H	CV-80-517-H
CV-79-1508-H	CV-80-074-H	CV-80-518-H
CV-79-1509-H	CV-80-224-H	CV-80-519-H
CV-79-1510-H	CV-80-225-H	CV-80-520-H
CV-80-006-H	CV-80-226-H	CV-80-780-H
CV-80-165-H	CV-80-227-H	CV-80-781-H
CV-80-166-H	CV-80-228-H	CV-80-782-H
CV-80-167-H	CV-80-229-H	CV-80-783-H

OPINION AND ORDER

This matter came on to be heard on May 26, and 27, 1980,

in open Court. The evidence was adduced by testimony of the parties and witnesses, by stipulations of fact by depositions and exhibits. The case has been fully briefed and argued by counsel. The Court notes that most of the material and relevant facts are not in dispute, many of which have been stipulated between the parties. While timely objections were made by counsel as to the admissibility of certain evidence, the Court has considered only that evidence which is material and relevant. After having considered the pleadings, briefs, evidence, and arguments of the parties, it is the judgment and opinion of the Court that the relief prayed for by the Plaintiffs should be granted, that Act 434 of the Regular Session of the Alabama Legislature of 1979 be stricken as null, void and unconstitutional in all respects and of no further force or effect, and that the Plaintiffs herein are entitled to a refund of taxes paid by them pursuant to the provisions of Act 434. These cases are somewhat complicated and involved by the fact that 42 separate and independent cases involving fourteen Plaintiffs were consolidated for discovery and trial. While each of the Plaintiffs sought a refund of taxes paid under Act 434, and while there were common issues presented by all Plaintiffs, certain contentions of the parties Plaintiffs were different from others in certain of the cases and there were different party Defendants in some cases. The Defendant, Ralph Eagerton, Commissioner of Revenue, was a common Defendant in all cases.

I. INTRODUCTION

These 42 consolidated cases seek to have the Court construe Act 434, 1979 Session Alabama Legislature, declare it unconsitutional and order a refund to the various Plaintiffs of the 2% increase in severance taxes paid by them under protest to the State of Alabama on their production of oil and gas within the State of Alabama. [1]

1/ Some Plaintiffs have also brought their suits against Co-Defendants with whom they have contractual arrangements pertaining to the payment of, or reimbursement for, severance taxes.

Act 434 was signed into law by the Governor on July 19, 1979, and became effective pursuant to its terms on September 1, 1979. The Act attempts to impose an increase in severance taxes of 2% (from 4% to 6%) on certain oil and gas production by amendment of Section 40-20-2, *Code of Alabama* 1975.

The contentions of Plaintiffs focus primarily upon four provisions of Act 434. One is the "Smackover Proviso" which appears as the last sentence of that portion of the Act that increases the tax rate from 4% to 6%. The Smackover Proviso reads as follows:

> Provided, however, that said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation.

The Smackover formation is an ancient geological formation which underlies twelve counties in southwest Alabama. It extends from Mississippi and other westward states across southwest Alabama into northwest Florida. The only county in Alabama having production from the Smackover formation from depths between 15, 000 and 15,800 feet is Escambia County. [2] This was true on September 1, 1979, when Act 434 purportedly became effective; it is also true now. Plaintiffs' contentions also focus on the "Royalty Owner Exemption" of the Act, which reads as follows:

> Any person who is a royalty owner shall be exempt from the payment of any increase in

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2/ This was the information supplied to Representative Brooks Hines by the State Oil and Gas Board which prompted the depth limitation set forth in the Smackover Proviso. If well depths are measured from mean sea level, one well in the Chatom Field, of Washington County, produces from the Smackover between 15,742 and 15,857 feet.

taxes herein levied and shall not be liable therefor.

Another such provision is the "Pass-Through Prohibition," which reads as follows:

> The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.

The fourth provision is the "Twenty-Six Barrel Provision" which reads as follows:

> All wells producing less than 26 barrels of oil per day shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production.

Generally stated, Plaintiffs contend the following:

(1) The Smackover Proviso causes Act 434 to be a "local" law; the Act, therefore, violates several provisions of the Alabama Constitution pertaining to "local" laws.

(2) Act 434 violates Section 45 of the Alabama Constitution because it contains more than one subject and the subjects are not clearly expressed in the title to the Act.

(3) Act 434 lacks uniformity and extablishes arbitrary classifications in violation of the equal protection and due process requirements of the Federal and Alabama Constitutions.

(4) Act 434 is void because it is so uncertain, ambiguous and conflicting as to be incapable of rational interpretation and equitable enforcement.

(5) Act 434 is unconstitutional under the Federal and the Alabama Constitutions because it impairs contractual obligations.

(6) Even if Act 434 is valid, it does not obligate some of Plaintiffs to pay the tax increase because (a) by virtue of the Smackover Proviso the tax is levied only on oil and gas production from this formation between the depths of 15,000 and 15,800 feet, and (b) by virtue of the Twenty-Six Barrel Exemption, by which wells producing less than twenty-six barrels of oil per day, are exempted from the tax increase. Thus, the production of various Plaintiffs is not subject to the tax increase.

Defendant contends that the Act increases the severance tax statewide and that the Smackover Proviso applies only to new wells between 15,000 and 15,800 feet in the Smackover formation. Defendant also contends that the other provisions of the Act and the Act itself will pass all constitutional tests.

Therefore, the parties' contentions are diametrically opposite. A cursory examination of the Act reveals several apparent conflicts and repugnancies that are apparent to the face of the Act. These include but are not limited to: the apparent impairment of contracts resulting from the new Royalty Owner Exemption and the new Pass-Through Prohibition; the taxation of royalty interest and the exemption of royalty owners within the Act itself; the apparent conflict with existing Code provisions such as Sections 40-20-1 and 40-20-3; the questionable different treatment of royalty owners with the "old" tax and the "new" tax; and the confusion between the parties relative to the meaning and effect of the Smackover Proviso.

The Court's first impression is that the Smackover Proviso clearly limits the increase from 4% to 6% to only those wells lying within the indicated depth interval and which are located in and producing from the Smackover formation. The insistence by the State to the contrary, and the contrary interpretation by the State, leads this Court to look into the history of the Act since the Court's function is to construe the Act according to the Legislature's intent. From the history and other evidence set out in detail below, it is without any reasonable dispute that the Legislature intended (1) to tax Smackover wells in Escambia County by an additional 2%; (2) to exempt the royalty owners of those Smackover wells from the increased tax burden and (3) to impose the tax increase solely on the producers.

II. FACTS

A. *Plaintiffs' Oil and Gas Production and Contracts*

Each of the Plaintiffs is engaged in exploring and prospecting for oil and gas within the State of Alabama. [3] The Plaintiffs have successfully completed wells producing oil or gas in paying quantities within the State of Alabama.

3/ Plaintiffs Exchange Oil and Gas Corporation, Getty Oil Company, and Union Oil Company of California have successfully completed and operate natural gas wells located primarily in Mobile County, Alabama. Plaintiffs Terra Resources, Inc., Warrior Drilling & Engineering Co., Inc., Pruet Production Company, Anderman Operating Company, and Petroleum Corporation of Texas, operate natural gas wells located primarily in Fayette and Lamar Counties, Alabama. In addition, Plaintiff Pruet Production Company operates oil wells located in Choctaw County, Alabama. Plaintiffs Exxon Corporation, The Louisiana Land and Exploration Company and Gulf Oil Corporation have their production primarily in Escambia County, Alabama. Plaintiffs Placid Oil Company and Midroc Operating Company operate oil wells located primarily in Clarke and Choctaw Counties, Alabama. Plaintiff, Citmoco Services, Inc., operates oil wells located in the Citronelle Field in Mobile County, Alabama.

Only the Plaintiffs Gulf, Exxon and LL&E, have production in the Smackover formation in the interval between 15,000 and 15,88 feet. All of the other Plaintiffs' production is in other formations and/or at other depths.

Each of the Plaintiffs' respective wells is located within what is known as a drilling and producing "unit," the size and configuration of which is established under Alabama law by the State Oil and Gas Board of Alabama, Section 9-17-1, et seq. *Code of Alabama* 1975. Plaintiffs do not own all of the production attributable to the unit wells located in each of their producing units. The units generally consist of several separate tracts of land which have been leased directly to the Plaintiffs or assigned to the Plaintiffs by assignees and successors of the original lessee. Production of oil or gas from the unit is allocated to the several owners based upon their pro rata ownership within the unit boundaries established by the Oil and Gas Board. The landowners are entitled to a certain percentage of the unit's total production known as royalty which varies from lease to lease, as established by negotiations between the parties, and may vary from 12-½% to as high as 54%, of the oil or gas produced. The owner of this royalty has the right under the lease contract to elect to take his royalty "in kind." Severance taxes under the terms of the leases are to be borne pro rata by both the lessor and the lessee.

Additionally, there are tracts covered by leases within any given production unit which the Plaintiffs do not own, but which are owned by other lessees or their assigns. The Plaintiffs, as operators of the well, are authorized to sell and do sell the oil or gas to third party purchasers and distribute the proceeds of the sale pro rata to each owner in the unit, including the royalty owners. Thus, the Plaintiffs, as unit operators of the wells, handle the production and sales proceeds from production for and on behalf of all owners in the unit, including landowners and royalty owners (which includes royalty sold by landowners to others who do not own title to the

mineral fee and/or royalty carved out of the working interests of leases and reserved by the assignors of other lessees) and other lessees.

The sales contracts of the various Plaintiffs entered into prior to the effective date of the Act all provide, to one extent or another, that severance taxes or increases thereof shall be borne by the purchaser.

In addition to the Smackover Proviso set forth above, the Plaintiffs also contest the validity and constitutionality of the Royalty Owner Exemption and the Pass-Through Prohibition.

In addition to the legal and constitutional objections and contentions made on behalf of all of the Plaintiffs, some of the Plaintiffs (Terra Resources, Inc., Petroleum Corporation of Texas, Warrior Drilling and Engineering Co., Inc., Anderman Operating Company and Pruet Production Company) claim, in addition, that the tax does not apply to most of their production, because most of the wells operated by them produce less than 26 barrels of oil per day. Their claim to this exemption is made under and pursuant to the following provision of the Act:

> *All wells* producing less than *26 barrels of oil* per day shall be taxed at the rate of 4% of the gross value of said *oil or gas* at the point of production. (Emphasis supplied.)

Each of these five Plaintiffs has proven that most of their wells produce less than 26 barrels of oil per day and are entitled to judgment in any event. [4]

4/ The Act does not purport to tax most of the production of the Plaintiffs, Pruet, Anderman, Terra, Warrior, and Petroleum Corporation of Texas because most of their wells produce less than 26 barrels of oil per day. Although Terra does have two wells which produce more than

B. *Legislative History*

The Act was initially introduced in the House of Representatives by Representative Hines of Escambia County, Alabama, as a bill of statewide application, increasing severance taxes from 4% to 6% on all production within the State. The bill was thereafter referred to the House Ways and Means Committee. Just prior to consideration of the bill as H. B. 148 (subsequently enacted as Act 434) by the Ways and Means Committee, the sponsor, Mr. Hines,amended the bill by adding the Smackover Proviso, the Royalty Owner Exemption and the Pass-Through Prohibition.

The testimony and evidence presented at trial show that Representative Hines appeared before the House Ways and Means Committee on or about June 6, 1979, presented his amended bill and represented to the Committee at that time that the bill had application only tc Escambia County. Accordingly, he asked the Committee for "local courtesy," meaning that the other members of the Committee would be expected to vote favorably for the measure, since it did not

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4/ Continued
26 barrels per day and which thus are not exempted. The language of this exemption from the face of the Act clearly exempts "all" wells which produce less than 26 barrels of oil per day. This exemption from the face of the Act is clear and unequivocal. This exemption by its terms applies to "all" wells regardless of whether they produce oil or gas. One of the earlier versions of the bill presented by Representative Hines, prepared by the Alabama Reference Service, did restrict the exemption operations to "oil" wells by insertion of the word oil after the word "all" so that the sentence commenced "all oil wells"; but the word oil was omitted from the language exemption on passage of the bill. See the trial testimony of Louis Green, Director of the Legislative Reference Service and Plaintiffs' Exhibit 27. On May 21, 1980, the Court entered judgments in favor of Petroleum Corporation of Texas and Terra Resources on the 26 barrel matter. This judgment was based on the uncontradicted evidence filed in support of the respective motions for summary judgment. The trial evidence, therefore, further supports said judgments.

affect their counties. During the debate and presentation before the House Ways and Means Committee, Representative Hines stated that H.B. 148, as amended, was applicable only to oil and gas production in the subsurface interval between 15,000 and 15,800 feet in the Smackover formation. He further stated that the only production in the State at these depths was located in his own County, Escambia County, and for these reasons, he was, therefore, asking for local courtesy. Mr. Hines, during debate before the House Ways and Means Committee, was specifically asked by a member of that Committee, Representative Sandusky, whether the bill applied only to Escambia County to which he replied in the affirmative. Later, on July 12, 1979, when the bill was presented on the floor of the House of Representatives, Mr. Hines made similar representations to the members of the House.

In addition, throughout its passage through the legislative process, the bill was treated as a local bill and was taken up out of order on the calendar for this reason. When the bill reached the Senate, Representative Hines again made representations before the Senate Finance and Taxation Committee of a similar nature, representing the bill as only taxing production in the stated interval. Similar representations were also made on the floor of the Senate where the bill was amended to include Sction 3, the severability clause. Finally, Mr. Victor Vernon, Assistant Director of the Legislative Fiscal Office, prepared an official memo which indicates that the Secretary of the Department of Revenue was apprised of the Act's local and restricted application as affecting only Escambia County and he advised Mr. Vernon that the revenue estimates should be changed to "reflect the Escambia County interpretation."

Significantly, after the bill was amended to include the Smackover Proviso, the Legislative Fiscal Office reduced its estimate of revenues to be generated by the Act from $5.4 million to $1.7 million. The reduced estimate was based on the oil and gas produced only in Escambia County, whereas the

earlier fiscal note had been based and calculated on statewide production. These Fiscal Notes were physically attached to the amended bill as required by the rules of both the House and the Senate. [5]

After the Bill was enacted, the Department of Revenue, in two memoranda released by it to the Alabama Petroleum Council, determined that it would interpret the Act as a statewide Act.

III. INTERPRETATION OF SMACKOVER PROVISO

A. General Interpretation

In light of the opposing contentions advanced by Plaintiffs and Defendant, it is necessary preliminarily to interpret the scope of the Smackover Proviso. That provision, the final sentence in the first paragraph of the statute (which increases the tax rate from 4% to 6%), reads as follows:

> Provided, however, that said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation.

Plaintiffs contend that the Smackover Proviso applies to, and

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5/ The Legislative Fiscal Office is a creature of statute being authorized under the provisions of Section 29-5-1 et seq. *Code of Alabama* 1975. These statutes specifically provide that the Fiscal Office will furnish information as to the revenues to be derived from proposed legislation to the Committee on Ways and Means of the House and the Committee on Finance and Taxation of the Senate. Section 29-5-7, *Code of Alabama* 1975. Under House and Senate Rules members of the Fiscal Office have floor privileges and under House Rule 63 and Senate Rule 77 a copy of the Fiscal Notes must be attached to each revenue measure.

limits the imposition of, the basic tax increase (from 4% to 6%). Defendant contends that the Smackover Proviso does not apply to the basic tax increase but instead modifies only the immediately preceding sentence which states that "(t) en years after production begins, such tax shall then be imposed at the rate of six per centum (6%) on such wells that go into production after the effective date of this act."

For several reasons it is clear that the Smackover Proviso applies to the basic tax increase from 4% to 6% and that Plaintiffs are correct in their interpretation.

The word "increase" appears at three places in the Act, and it is appropriate that this word have the same meaning in all three places. One place is the Smackover Proviso. Another place is the title of the Act which states that one of the Act's purposes is "to increase the rate of tax." As used in the title, the word "increase" is a clear reference to the basic increase in tax rate from 4% to 6%. The third place where the word "increase" appears is the Royalty Owner Exemption which reads as follows:

> Any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefor.

In that provision the word "increase" also refers to the basic increase in tax rate from 4% to 6%. In fact, the Department of Revenue has so interpreted the provision. A memorandum from the Legal Division of the Department of Revenue was introduced for the purpose of showing the Department's interpretation. The memorandum states the following concerning the effect of the Royalty Owner Exemption:

> However, since the royalty-interest owner's share is exempt from "the payment of any

increase in taxes" levied in Act 434, the producer may not deduct from the royalty-interest owner's portion any amount which would represent the 2% increase in taxes levied by Act 434.

Additionally, the Smackover Proviso appears as a completely independent sentence, not a mere clause appended to the immediately preceding sentence. This indicates that the Smackover Proviso was intended to have much broader application than merely to the immediately preceding sentence. Moreover, the Smackover Proviso was not a part of the original bill but was inserted later by amendment. Because it was inserted by amendment both as a completely independent sentence and at the very end of the paragraph in which it appears, it is clear that the sentence was intended to apply to, and restrict, the basic increase in tax rate imposed by the paragraph. [6] Also, because both the Smackover Proviso and the Royalty Owner Exemption were inserted by amendment at the same time, the word "increase" appearing in both provisions should have the same meaning. Provisos which follow after a statute's enacting clause are to be given a rational interpretation in harmony with the general purpose and intent of the statute, with a view to carrying into effect the purpose of the law. ***Chandler v. Waugh***, 290 Ala. 70, 274 So. 2d 46 (1973). The appropriate office of a proviso is to restrain and modify the enacting clause and preceding matters and where it is manifest that the intent was that it apply to other portions, it will be construed to restrain or qualify even other and separate sections and paragraphs of the Act. ***Wartensleben v. Haithcock***, 80 Ala. 565, 1 So. 38 (1887); and ***Cooper v. State***, 28 Ala. App. 422, 187 So. 500 (1939). Such is the case here, the location of the proviso, as underscored by the legislative history, restricts

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6/ As stated in *State v. Crenshaw*, 287 Ala. 139, 249 So. 2d 622 (1971), the "last [provision] in order of arrangement controls."

the tax increase to wells at the stated depths in the stated formation and, therefore, does not levy a tax on the production of the Plaintiffs, Union, Getty, Exchange, Placid, Terra, Citmoco, Pruett, Warrior, Anderman, Midroc, and Petroleum Corporation of Texas; but does, if constitutional, purport to tax the production of Exxon, LL&E and Gulf.

If there is any merit at all to Defendant's contention, the statute at best would be ambiguous when viewed from Defendant's standpoint. Such an ambiguity would bring into play the familiar rule of interpretation that "construction of it must be against taxing power and in favor of taxpayer." ***Butler & Kennamer Wholesale Company v. State***, 293 Ala. 216, 301 So. 2d 178 (1974); ***State v. Alabama Leasing Company***, 336 So. 2d 1353 (Ala. 1976).

Even without considering the Act's legislative history it is clear that the Smackover Proviso applies to the basic tax rate increase from 4% to 6%, and the Court so holds. The legislative history, if taken into account, unmistakably confirms the correctness of this holding.

The legislative history as shown by the testimony and evidence at trial make the conclusions reached in this respect crystal clear. This Court has not considered any evidence relating to the "motive" or "reasons" of the Legislature or any conclusions of legislators regarding their "motives" or "opinions" as condemned in ***James v. Todd***, 267 Ala. 495, 103 So. 2d 19 (1957). The actual testimony of the bill's sponsor, his explanation and representations with regard to the bill's scope, both before the Committees and on the floor of both houses, is both relevant and competent evidence. Courts generally have looked to statements of the sponsor of the bill, the committee member in charge of the bill and to the draftsman's understanding of the bill's nature and effect in determining legislative intent. Sutherland, ***Statutory Construction***, §4814, §4815 and §4810 (4th ed. 1973). In the course of

deliberations on any bill, legislators naturally look to its sponsor, as well as to the representative of the Committee in charge of it, as one who is expected to be particularly well informed about its purpose, meaning and intended effect; and in recognition of this reality of legislative practice, courts give weight and consideration to statements made by such parties. 2A *Sutherland*, §§4814, 4815. In this same connection Sutherland further states:

> . . . if the draftsman's views were clearly and prominently communicated to the legislature when the bill was being considered for enactment, so as to give reason to believe that the legislators' understanding of the bill would have been influenced by the draftsman's communicated views and so as to be visible to others who are concerned to understand the meaning of the act, there is reason to invoke an exception to the general rule and attach weight to the draftsman's views. *Sutherland, supra*, at §4812, p. 215.

The courts have consistently followed this general rule.[7]

7/ *Alabama C. Bd. of H. ex rel. Baxley v. Chambers County*, 335 So. 2d 653 (1971) (Court will look less at "letter or words of statute" than at the . . . reason and spirit of the law" which is the "pole star" of statutory construction.); *Harrison v. Northern Trust Co.*, 317 U.S. 418 (1942), (Court looks to legislative history for explanation of act's meaning "no matter how clear the words may appear on 'superficial examination.' "); *U. S. v. American Trucking Assoc.*, 310 U.S. 532 (1939), (Court has duty to look to legislative purpose even where wording of statutes are plain and clear since there is no "rule of law" forbidding interpretation in accordance with the legislative purpose); *Galvan v. Press*, 347 U.S. 522 (1954), (Oral statement and written memorandum of the sponsor described as a "weighty gloss" on the legislation); *NLRB v. Fruit and Vegetable Packers & Warehousemen*, 377 U.S. 58 1964) and *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) ("[I] t is the spon-

The Supreme Court of Alabama has held in a number of cases that legislative history is relevant and admissible. Thus in *State Docks Commission v. State ex rel. Jones*, 227 Ala. 521, 150 So. 537 (1933), the Supreme Court specifically referred to a number of aids to ascertain the legislative intent, including the legislative journals, the fact that the Standing Committee on Finance and Taxation had reported the bill to the Senate, the fact that *a substitute bill had been referred to* and reported on by the Standing Committee on Appropriations; the fact that the Standing Committee on Enrolled Bills had given a specific report and a message from the House to the Senate. To the same effect see also, *Southern Express Co. v. I. Brickman & Co.*, 187 Ala. 637, 65 So. 954 (1914); *American Bakeries Co. v. City of Opelika*, 229 Ala. 388, 157 So. 206 (1934); *Houston County v. Martin*, 232 Ala. 511, 169 So. 13 (1936); and *State v. T. R. Miller Mill Co.*, 272 Ala. 135, 130 So. 2d 185 (1961). Likewise in *Morris v. State*, 271 Ala. 290, 122 So. 2d 914 (1960), the Supreme Court said:

> In construing statutes, it is our *duty* to examine the legislative history in order to ascertain the true intent of the law-making body. 271 Ala. at 292, 122 So. 2d at 915 (Emphasis supplied).

7/ Continued

sors to which the court looks when the meaning of the statutory words is in doubt.") (Oral and written statements of the sponsor); *Chicago and NWR Co. v. United Trnsp. Union*, 402 U.S. 570 (1971), (Oral statements of the proponents declared to be "entitled to great weight" in construction of an act.); *National Woodwork Mfrs. Asso. v. NLRB*, 386 U.S. 612 (1987), (Silence of the sponsors on certain points was looked to in construing the act.); *Silver v. Brown*, 48 Cal. Rptr. 609, 409 P. 2d 689 (1966), (Affidavits of drafting employees admitted in evidence where recorded floor discussions and debated note available.); 143 Conn. 280, 121 A. 2d 630 (1956), (Oral statements of House member in charge of bill declared to be "strong indication of the legislative intent."); *Brennan v. Corning Glass Works*, 480 F.2d 1254 (3d Cir. 1973), (Sponsor's statements admitted in evidence and declared to be "entitled to great weight.")

Even more significant is the decision in the Supreme Court in *Morgan v. Board of School Commissioner of Mobile County*, 248 Ala. 22, 26 So. 2d 108 (1946), where the court held as follows:

> In addition to the historical background shown by the foregoing enactments, *the words of the members of the Constitutional Convention of 1901 uttered on the floor of the convention* are helpful in arriving at a correct construction of Section 270 of the Constitution of 1901. 248 Ala. at 25, 26 So. 2d at 110. (Emphasis supplied)

In the *Morgan* case, the court then went on to examine and rely upon statements made by members of the convention in rendering its determination and quoted in extenso the exact language used by certain members during floor debate. Of similar import is the case of *Ex parte Southern Bell Tele. & Tele. Co.*, 267 Ala. 139, 143 99 So. 2d 118, 121 (1957), where the court noted that "[a]lthough the debates of the constitutional convention are not binding on this court, they are highly persuasive. . . ." Thus, the fact that the portions of the statute under consideration which are in contention, were offered by amendment within the Committee on Ways and Means of the House of Representatives, the fact that its sponsor on the floor of the House and in committee repeatedly explained and represented the bill as affecting only the production in the stated interval and geological formation, the fact that the Alabama Fiscal Office in performance of its statutory duty projected an estimated revenues on a local basis (i. e., Escambia County production of oil and gas) and attached that Fiscal Note to the bill itself as required by the rules of the House and Senate, and the other facts considered by the Court are all relevant legislative history to establish with overwhelming clarity the intention of the legislature and the intent of the bill itself. It is a bill which purports only to tax production in

the stated interval, and no other area in the state on the effective date of the Act or at the present time is producing from those intervals except Excambia County.

IV. ACT 434 IS A "LOCAL" LAW AND, AS SUCH, VIOLATES THREE PROVISIONS OF THE ALABAMA CONSTITUTION

A. *Smackover Proviso Makes Act 434 a "Local" Law*

Having found that the increase of 2% attempted to be levied by Act 434 taxes and applies only to the production of oil and gas now located in Escambia County with no effect or impact upon production elsewhere in the State, the question arises as to the validity and constitutionality of a taxing statute which taxes the production of only one county or, at the best, production from a portion of one subsurface stratum or formation. By definition, a "local" law is one which applies to a portion of the state, but not the entire state. A law which applies only to one county, or only to several counties, is a "local" law. In light of this definition, the Smackover Proviso clearly makes the Act a "local" law.

Section 110, Article IV of the Alabama Constitution, as amended by Amendment No. 375, defines a "local" law as being one which is not a private law or a "general" law, and defines a "general" law as being one which applies "to the whole state" (or, although not relevant here, to one or more municipalities).

Alabama cases establish that a "local" law need not apply to just one county or one political subdivision, but that the law will be "local" even if the affected area encompasses portions of several political subdivisions, so long as the entire state is not affected. ***State ex rel. Attorney General v. Sayre***, 142 Ala. 641, 39 So. 240 (1904); ***Opinion of the Justices***, 278 Ala. 98, 176 So. 2d 29 (1965); ***State v. Lash***, 350 So. 2d 748 (Ala. Cr. App. 1977).

The Smackover Proviso restricts the scope of the tax increase by providing that "said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 in the smackover formation." There are two different but related reasons why the Smackover Proviso causes Act 434 to be "local." The first is that as a matter of unchanging geological fact the Smackover formation underlies only twelve counties in Alabama; hence, it is inconceivable that Act 434 can apply to the entire State because fifty-five of the counties are not even underlain by the Smackover formation. [8] A Separate but related reason why Act 434 is "local" is that, when the Act became effective, only Escambia County had production from the Smackover formation at 15,000 to 15,800 feet.[9] While it is conceivably true that one of the other southwest Alabama counties could at some future date have production from the Smackover fromation at 15,000 to 15,800 feet (although this has not yet occurred), the Supreme Court of Alabama has made it clear that the significant time for determining whether an act is local is the ***effective date*** of the Act. In ***Peddycoart v. City of Birmingham***, 354 So. 2d 808 (Ala. 1978), the Court stated that Section 110 of the Alabama Constitution (defining "local" laws) is applicable "when it [the bill] becomes law," and that "[i]f, when it becomes law it applies only to a subdivision of the state, it is a local law." 354 So. 2d at 814.

The Smackover Proviso's "local" scope is underscored by its "double classification" feature. Two criteria - - depth and formation - - are embodied in the phrase "wells from between 15,000 and 15,800 feet in the Smackover formation." The

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8/ Of the twelve counties underlain by the Smackover formation, only six of these have the Smackover formation at a depth of 15,000 to 15,800.

9/ This is the data furnished by the State Oil and Gas Board.

separateness of the criteria of depth and formation is demonstrated by the fact that there are a number of wells in the Smackover formation at shallower and deeper depths and the fact that at 15,000 to 15,800 feet there is production from a formation other than the Smackover (namely the Norphlet formation).

In a number of decisions, the Supreme Court of Alabama has condemned "double classification" as simply being a "designation" of a particular locality to which the statute would apply. The following language appears in *Ward v. State ex rel. Lea*, 224 Ala. 242, 139 So. 416 (1932);

> We have condemned double classification which tended to confine the operation of the law to one particular locality . . . for such a law results in a designation rather than classification.

224 Ala. at 244, 139 So. at 417. In *State ex rel. Saltsman v. Weakley*, 153 Ala. 648, 45 So. 175 (1907), the Court considered a statute which pertained to "cities of 35,000 population, or more, in counties of 125,000 or more population." 153 Ala. at 650, 45 So. at 175. The criteria concerning both cities and counties were utilized. The Court stated that "[w]e find no case in the books upholding, as a general law, an Act with a double or reclassification, such as the one in question." The Court held that the statute was "local" and that it violated Section 106 of the Alabama Constitution because no notice was published or posted as required for "local" laws. Other relevant Alabama cases in accord with *Ward* and *Weakley* are *McCoy v. Jefferson County*, 232 Ala. 651, 169 So. 304 (1936); *Henry v. Wilson*, 224 Ala. 261, 139 So. 259 (1932); and *State ex rel Conrad v. Board of Road Commissioners*, 231 Ala. 18, 163 So. 345 (1935).

Consequently, the Smackover Proviso unquestionably causes

Act 434 to be a "local" act subject to several requirements imposed by the Alabama Constitution concerning the enactment of local legislation.

B. *Section 106 - - Publication Requirement*

Section 106 of Article IV of the Alabama Constitution provides that "(n) o special, private, or local Act shall be passed on any subject. . . unless notice of the intention to apply therefor shall have been published" according to the requirements of Section 106, An Act which is "local" and which was passed without compliance with Section 106 is unconstitutional. *Opinion of the Justices*, 356 So. 2d 118 (Ala. 1978); *Couch v. Rodgers*, 253 Ala. 533, 45 So. 2d 699 (1950).

It is undisputed that notice of the intention to apply for the legislation resulting in Act 434 was not published or posted in accordance with requirements of Section 106 of the Alabama Constitution. For this reason Act 434 is void.

C. *Section 111 - - Change on Passage to Become "Local" Law*

Section 111 if Article IV of the Alabama Constitution provides that "(n) o bill introduced as a general law in either house of the legislature shall be so amended on its passage as to become a special, private or local law."

As the legislative history reveals, the original bill imposed a tax increase in respect of statewide oil and gas production. By virtue of the Smackover Proviso which was inserted when the bill was amended, the Act imposed the tax increase only in respect of production from 15,000 to 15,800 feet in the Smackover formation.

Accordingly, the bill was "introduced as a general bill" and was "so amended on its passage as to become a . . . local

law" in violation of Section 111. It is, therefore, unconstitutional. See *Opinion of the Justices,* 284 Ala. 626, 227 So.2d 396, 397 (1969).

D. *Section 105 - - Subject "Provided for by a General Law"*

By virtue of Section 105 of Article IV of the Alabama Constitution, no "local" law "shall be enacted in any case which is provided for by a general law. . . ."

In *Peddycoart v. City of Birmingham,* 354 S – . 2d 808 (Ala. 1978), the Court held that Section 105 was violated because the statute in question was a "local" law which covered a subject that was "provided for by a general law." The "local" law applied only to Birmingham by virtue of a population classification; it conferred on the city a type of immunity in tort. General statutes already dealt with the matter of municipal liability in tort. In addressing the question whether the subject was "provided for by a general law," the Court repudiated three different ways in which the Court in a number of prior cases had gotten around Section 105. Then the Court concluded that the presence of a general law is "*primary,* and means that a local law cannot be passed upon that subject." 354 So.2d at 813. (emphasis original) While the Court made its decision prospective rather than retroactive, it indicated clearly that general law on the subject of "municipal liability in tort" precluded, by virtue of Section 105, a local law conferring immunity on a particular city.

Since *Peddycoart* the Court has considered Section 105's application to "local" law in several cases. In *Opinion of the Justices,* 354 So. 2d 148 (Ala. 1978), the Court advised the legislature that a proposed bill purporting to exempt Choctaw County from the statewide requirement that county engineers be qualified land surveyors was unconstitutional, holding that the bill would be a "local" law operating "on a subject already subsumed by a general law and [would] violated Section 105."

357 So. 2d at 149. In *ABC Bonding Co. v. Montgomery County Surety Commission*, 372 So. 2d 4 (Ala. 1979), the Court held that a statute revising bail practices in the Fifteenth Judicial Circuit was unconstitutional under Section 105 because a statute of statewide application covered many of the same points. In *Yancey & Yancey Construction Co. v. DeKalb County Commission*, 361 So. 2d 4 (Ala. 1978), the Court considered a contention that the local law violated Section 105 because it permitted a coal severance tax for DeKalb County when general statutes already levied a coal severance tax statewide. Because the Act in *Yancey* was passed *before Peddycoart*, the Court pointed out that the holding in *Peddycoart* "was expressly limited to legislation enacted after the date of that opinion" and stated that, therefore, the rules which were applied prior to *Peddycoart* must govern. 361 So. 2d at 5, Applying the pre-*Peddycoat* rules, the Court concluded that the local severance tax statute was not proscribed by Section 105. However, it is clear that the result would have been different if the local Act had been enacted after the decision in *Peddycoart*. [10]

As a "local" law, Act 434 clearly violates Section 105 because an oil and gas severance tax was already "provided for by a general law." Existing statutes already imposed a statewide oil and gas severance tax, *Peddycoat* clearly indicates that this statewide severance tax was a "general law" which precluded a "local" law increasing the tax in a portion of the state.

10/ This conclusion is supported by *Peddycoart's* repudiation of *Standard Oil Co. of Kentucky v. Limestone County*, 220 Ala. 231, 124 So. 523 (1929), the pre-*Peddycoart* decision on which the Court in *Yancey & Yancey Construction Co.* relied.

V. ACT 434 LACKS UNIFORMITY AND ESTABLISHES ARBITRARY CLASSIFICATIONS IN VIOLATION OF THE EQUAL PROTECTION AND DUE PROCESS REQUIREMENTS OF THE FEDERAL AND STATE CONSTITUTIONS

As indicated above, the Plaintiffs have completed and operate wells producing oil or gas in commercial quantities in drilling and producing units established by the State Oil and Gas Board of Alabama. These duly established drilling and producing units consist of various tracts and interests not all of which are covered by leases owned by or assigned to the various Plaintiffs. Under the terms of the leases owned by the respective Plaintiffs, severance taxes are to be borne on a pro rata basis by both the lessee and lessor/royalty owner.

The Royalty Owner Exemption is contained in paragraph 1(d) of the Act and provides as follows:

> Any person who is a royalty *owner* shall be exempt from the *payment of any increase in taxes herein levied and shall not be liable therefor*. (Emphasis supplied).

The Defendant has construed and is enforcing the Act so that the 2% increase cannot be deducted from the royalty owner's share.[11]

11/ Plaintiffs' Exhibit 19, page 2, memo of counsel to the Defendant dated September 12, 1979, outlining interpretation of this exemption together with the Pass-Through Prohibition contained in paragraph 1 (e) of the Act. See also, the Plaintiffs' Exhibit 18, a memo from counsel for the Defendant dated August 16, 1979 stating in part as follows: ". . .it is my opinion that in the case where an interest in an oil and gas well is owned by a royalty owner, the oil and gas severance tax will be paid on the oil or gas severed by the producer." Subsequently, this opinion and interpretation was modified (see Plaintiffs' Exhibit 19) where

Section 1(e) of Act 434 contains the "Pass-Through Prohibition" and provides that:

> The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this section that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.

The Defendant has construed "the intent of the Legislature" with respect to Section 1(e) so as to prohibit the severance tax from being passed on to any party.[12] Thus, the combined effect and impact of the Royalty Owner Exemption of paragraph 1(d) and the Pass-Through Prohibition contained in

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11/ Continued
the Defendant interpreted the Act as follows: "However, since the royalty-interest owner's share is exempt from the 'payment of any increase in taxes' levied in Act 434, the producer may not deduct from the royalty-interest owner's portion any amount which would represent the 2% increase in taxes levied by Act 434. . . . Thus, it is my opinion of Act 434 that the producer is liable for the entire 6% of oil and gas severance tax levied. . . .In addition, the royalty-interest owner would be exempt from the payment as a producer of the increase in oil or gas severance tax of 2%. However, . . . the royalty-interest owner may be liable for the payment of a protion of 4% of the severance tax."

12/ See Plaintiffs' Exhibit 19 where counsel to the Defendant construes the Act as follows: ". . .Act 434 clearly manifests the intent of the Legislature that the oil and gas severance tax *henceforth* shall be paid by the producer and *shall not be passed on to anyone*. Therefore, it is my opinion that the producer is now liable for the entire oil and gas severance tax."

paragraph 1(e) is that the "producer" is required to bear and absorb a portion of the tax attributable to production of the mineral owner and, purportedly, cannot charge or pass on any portion of the tax to any party.

The statutory scheme created by Section 40-20-1, et seq. *Code of Alabama* 1975 clearly imposes a tax upon producers in direct proportion to their ownership. It is by its terms a tax on mineral ownership of producing mineral interests, whether the interest is a leasehold (working interest), royalty or overriding royalty interest, which is in lieu of ad valorem taxes. §40-20-12, *Code of Alabama* 1975.

A "producer" is defined by the terms of Section 40-20-1(8) as follows:

> (8) PRODUCER. Any person engaging or continuing in the business of oil or gas production, which, ***for the purpose of this article,*** includes the ***owning,*** controlling, managing, or leasing of controlling, managing, or leasing of any oil or gas property or oil or gas well, and producing in any manner any oil or gas by taking it from the soil or waters, or from beneath the soil or waters, of the state of Alabama, and further includes ***receiving money*** or other valuable consideration a royalty or rental for oil or gas produced or because of oil or gas produced, ***whether produced by him or by some other person on his behalf,*** either by lease, contract or otherwise, ***and whether the royalty consists of a portion of the oil or gas produced*** being run to his account or a payment in money or other valuable consideration. (Emphasis supplied).

The fact that a royalty owner is considered and defined in this section to be a "producer" is given credence by the Defendant, at least in part, since the Defendant interprets this section in conjunction with Act 434 to require the royalty owner "as a producer" to bear its fair share of the 4% tax, but not its fair share of the 2% increase; and thus under the Defendant's interpretation, the royalty owner is considered partly as a producer and partly as a non-producer.[13]

Furthermore, Section 40-20-2(b) specifically provides that royalty is included within the tax base or classification in the following language:

> The tax is hereby levied upon the basis of the ***entire production*** in this state, ***including what is known as the royalty*** interest. . . . (Emphasis supplied)

Section 40-20-3, *Code of Alabama* 1975 imposes the tax on all producers in proportion to their ownership in the following language:

> (a) The privilege tax hereby imposed is levied upon the producers of such oil or gas ***in the proportion of their ownership at the time of severance***, but, except as otherwise herein

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13/ See Plaintiffs' Exhibit 19 wherein counsel for the Defendant quotes Section 40-20-1(8) at length and makes the following comment with respect thereto: "As can be seen from the above quoted definition of the term 'producer' a royalty-interest owner would be considered a 'producer' within the definition of the term as used in the oil and gas severance tax act. . . . [I]t is my opinion that while the producer is liable for the entire severance tax at the rate of 6%, the producer may deduct from the royalty-interest owner's share an amount that would reflect the payment of the severance tax by the royalty-interest owner up to 4%."

provided, the tax shall be paid by *the person in charge of production operations, who is hereby authorized, empowered and required to deduct from any amount due to producers of such production at the time of severance the proportionate amount of the tax* herein levied before making payments to such producers.

. . .

(b) When any person in charge of production operations shall *sell* the oil or gas produced by him, *the purchaser shall account for the tax.*

(c) When any person in charge of production operations shall use or dispose of the oil or gas for fuel or any other purpose, he shall *withhold* the tax imposed by this article; and, *if he is required to pay other interest holders,* he is hereby authorized, empowered and required *to deduct from any amounts due them the amount of tax levied and due under the provisions of this article before making payment to them.* (Emphasis supplied).

The provisions of this section clearly show that the tax is based and levied upon *mineral ownership* and is to be paid proportionately by the respective "owners" which is, in all respects, and by any yardstick, a fair, reasonable, equal and equitable classification for imposition of the tax. [14] In addition, Section 40-20-3(b) expressly provides that purchasers shall account to the State in instances where the producer has contracted to sell oil and/or gas.

14/ The Defendant has recognized ownership as the proper basis of the tax. See Plaintiffs' Exhibit 19 wherein counsel to the Defendant states in part: "The royalty interest *owner* may be liable for payment of a portion of the 4% of the severance tax."

Finally, Section 40-20-12, *Code of Alabama* 1975 exempts all mineral rights in producing properties and all oil or gas under the ground on producing property from ad valorem taxes. Said section provides in pertinent part as follows:

> (a) All oil or gas produced, all leases in production, including mineral rights in producing properties, and all oil or gas under the ground on producing properties within the state of Alabama ***shall be exempt from all*** ad valorem taxes.
> . . .
>
> (b) For the purpose of this article, the area of a lease or leases, including all oil and gas rights considered to be in production, . . . shall include an oil or gas drilling unit as established by the state oil and gas board of Alabama and shall be exempt from ad valorem taxation because of production from any one well. (Emphasis supplied)

The provisions of this Section clearly indicate that the severance tax is a substitute for and in lieu of ad valorem taxes based on ownership. Because of the fortuitous event of achieving actual production of oil and gas the owner's tax burden on his mineral interest as a landowner is automatically shifted to the "producer" who has brought in the well. Since the landowner would be liable for taxes on his minerals in the absence of production or if the well is a dry hole, it is, to say the least, arbitrary to exempt the landowner from his land taxes when and only when that mineral interest fortuitously produces oil or gas.

The foregoing statutory scheme, in conjunction with the Smackover Proviso, clearly indicates the intention to tax the entire production from wells in the stated depth interval in the

stated geological formation from any given unit, with the tax to be borne by "producers," including royalty owners, in proportion to their ownership. The Royalty Owner Exemption and Pass-Through Prohibition conflict with and are repugnant to this statutory design and result in unequal and discriminatory taxation. The attempt made in Act 434 to exempt royalty from the class of "producers" and require the operator/producer of the well to bear this additional burden is without precedent under the laws of any other oil producing state. Every other producing state taxes royalty proportionately on its share of its own production. [15] Neither has any other state ever attempted to preclude a producer of oil or gas from "passing through" any part of its overhead such as severance taxes.

The Royalty Owner Exemption exempts one share of a well's production from taxation while taxing the remaining owners' share of production. The Pass-Through Prohibition takes the process one step further and attempts to impose payment of the royalty owners' taxes on the share of production of producer without regard to the royalty owners' ownership in production from the same wells. [16] Since royalty is

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15/ Kuntz, *Law of Oil and Gas*, Vol. 6.

16/ One kind of royalty is merely the landowner's share of production, free of expenses of production, as created under an oil, gas and mineral lease. Further, royalties include royalty owned by parties other than a landowner or overriding royalty cut out of the lessee's share of production. The royalty under oil and gas leases is a certain fraction of production and is payable in kind or payable in money. Although royalty is not subject to cost of production, it is subject to cost incurred after production, e. g., production or severance taxes, cost of treatment of the product, pipeline costs or transportation costs to market. William and Meyers, *Manual of Oil and Gas Terms* (4th ed. 1976). See also *Simson v. Langholf*, 33 Colo. 208, 293 P.2d 302 (1956); *Longino v. Machen*, 217 Ark. 641, 232 SW. 2d 826 (1950); *Hinkle v. Gauntt*, 201 Okla. 432, 206 P.2d 1001 (1949); *State National Bank of Corpus Christi v.*

entitled to, in many cases, a considerable proportion of the production free and clear of drilling and development costs, the working interest owners (i.e., the parties taking the risk of drilling the well) is taxed unequally and unfairly since the classification of taxpayer (i.e., all owners of interests in production from a well except royalty owners) is discriminatory, unreasonable, arbitrary, capricious, and unsupported by any reasonable or rational basis. There is no rational basis for requiring a producer to absorb and pay the taxes of landowner/royalty owners who own interests in production from the unit well. There likewise is no rational basis for imposing on that producer the entire tax burden by requiring that the producer shoulder this burden in deference to interstate pipeline purchasers/carriers. These provisions of the Act deny the Plaintiffs equal protection of the laws and manifestly impair and abrogate their contracts wherein their purchasers have agreed to pay and/or absorb the tax.

The 14th Amendment of the Constitution of the United States provides in pertinent part as follows:

> . . . nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.

16/ Continued
Morgan, 135 Tex. 509, 143 SW.2d 757 (1940).

The cases have recognized that the lessor and lessee under an Oil, gas and mineral lease are obligated to each pay their proportionate share of severance and other taxes levied upon production. *Gulf Refining Co. v. Stone*, 197 Miss. 713, 21 So. 2d 19 (1945); *Canadian River Gas Co. v. Bivins*, 137 Tex. 347, 153 SW. 2d 432 (1941); *Sartor v. United Gas Pub. Ser. Co.*, 186 La. [illegible], 173 So. 103 (1937). Thus, in *Barwise v. Sheppard*, 299 U. S. 33 (19[illegible]), the Supreme Court of the United States upheld a state statute that imposed the tax on royalty owners' production as well as on the production of the working interest owners. The Court noted that royalty owners/lessors and working interest owner/lessees are "engaged in a common venture for their mutual benefit" and have "a common purpose of producing." 299 U. S. at 39.

The equal protection clause first was interpreted in 1873 in the ***Slaughter-House*** cases, 16 Wall. 36, 21 L. Ed. 394 (1873). In the case of ***Missouri v. Lewis (Bowman v. Lewis)***, 101 U.S. 22, 31, 25 L. Ed. 989, 992 (1879), the Supreme Court said:

> It [equal protection] means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

Sections 1, 6 and 22 of the Alabama Constitution of 1901 combine to guarantee equal protection of the laws. ***Black v. Pike County Commission***, 360 So. 2d 303 (Ala 1978); ***City of Hueytown v. Jiffy Check Co. of Alabama.***, 342 So. 2d 761 (Ala. 1977).

There is no doubt that the guarantee of the equal protection clause applies to the exercise by a State of the power of taxation. Consequently, the taxing power of the state is limited where it seeks to impose upon members of a selected class a burden which is not shared by other members of the particular class. ***Hartford S. B. I. & Inx. Co. v. Harrison***, 301 U. S. 459 (1937); ***State Board of Tax Commissioners v. Jackson***, 283 U. S. 527 (1931); ***McCarthy v. Jones***, 449 F. Supp. 480 (S. D. Ala. 1978); ***Weissinger v. Boswell***, 330 F. Supp. 615 (M. D. Ala. 1971). In this regard, the Supreme Court of the United States stated as follows in ***Louisville Gas & Electric Co. v. Coleman***, 277 U.S. 32 (1928):

> . . . the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, . . ., and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. 277 U.S. at 37

In *Coleman*, the Court, in striking down a statute imposing a tax on the recordation of mortgages but exempting mortgages executed to building and loan associations from the application of the tax liability, made the following statement concerning classifications:

> . . .[T] he classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' . . . This is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, . . .'" 277 U.S. at 38.

The Alabama cases are uniform in striking down taxing ordinances and statutes where one segment of the general class sought to be taxed is exempted from taxation without any rational reason. Decisions of the Supreme Court of Alabama are particularly relevant to the situation at hand, and, by analogy, demonstrate the arbitrariness and capriciousness of the Royalty Owner Exemption and Pass-Through Prohibition.

In *Alabama Consolidated Coal & Iron Co. v. Herzberg*, 177 Ala. 248, 59 So. 305 (1912), the Court held a tax statute unconstitutional because the tax was "not . . . imposed upon the business, or upon all engaged in a similar business, but [was] based solely upon the manner in which a party may conduct the business." 177 Ala. at 250. The statute taxed persons conducting "a commissary at which their employees trade on checks, orders or other devise. . . ." In *City of Mobile v. La Clede Hotel Company*, 221 Ala. 531, 129 So. 477 (1930), the Court held a tax ordinance to be arbitrary and capricious, and, therefore, invalid where it attempted to tax all hotels but

exempted hotels of 15 rooms as well as hotels of 30 to 35 rooms. In this connection, the Court said as follows:

> But to sustain the ordinance there must be uniformity of the tax burden upon those in the same class, there must be no fanciful or capricious classification. . . . [t] his ordinance offends this well-recognized principle. Though diclosing a general purpose to tax all hotels by classification as above outlined, yet there is discrimination in that hotels of fifteen (15) rooms, and those of thrity (30) to thirty-five (35) rooms are not taxed. They are omitted from the schedule. . . . We can, of course, conceive of no substantial basis for such exemption classification, and none is here suggested. It must therefore be condemned as arbitrary and capricious, and thus invalidate the ordinance. 221 Ala. at 532.

Of similar import is the decision in ***Woco Pep. Co. of Montgomery v. City of Montgomery***, 213 Ala. 452, 165 So. 214 (1925) where the Court held a taxing ordinance to be invalid because it was arbitrary and lacked "legal equality." In that case the ordinance sought to tax parties engaged in the selling of motor fuels but purported to exempt local dealers although those purchasing from a non-resident dealer were taxed. More recently, in ***City of Birmingham v. Brimingham Business College***, 256 Ala. 551, 56 So. 2d 111 (1951), the Supreme Court struck down an ordinance which imposed license charges upon a "business College" but not upon other schools which were conducted for profit but taught other types of subjects. The Court concluded the ordinance violated the Fourteenth Amendment, with the following language:

> We do not think it is a proper classification for license charges within the meaning of the

> Constitution to put schools conducted for profit and privately owned in different classes with respect to each other solely on account of a difference in the subjects taught in them, respectively. We think the business of conducting a private school for profit, if it is made the subject of a license tax, should include all such businesses, unless there is a status which supports a different exercise of the policy power and, if not so included, there is a discrimination within the equal protection clause of the Fourteenth Amendment.

A similar approach has been adopted in *State v. Murphy*, 45 Ala. App. 637, 235 So. 2d 888 (1970).

The case of *Al Means, Inc. v. City of Montgomery*, 268 Ala. 31, 39, 104 So. 2d 816 (1958), provides further guidance concerning the validity of classifications. There the Court said:

> It is essential that the classification itself be reasonable and not arbitrary, and be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation or considerations of policy, and that there be uniformity within the class.

In the context of Act 434, there can be no "material and substantial distinction" or reasonably related difference which justifies exempting the royalty share of oil and gas production from a well, which is free of risk and drilling cost, and at the same time taxing the share in production of working interest owners which bear the cost of production at least to the point of production. There is even less material and substantial distinction to justify the attempt in Section 1(e) of Act 434 to require the producing party to absorb and bear the entire tax.

There is absolutely no difference or distinction in the oil or gas emanating from the same well, in the same unit, which would in any way rationally dictate that one share of that production would be free of tax, with that tax to be absorbed by other parties engaged in the joint venture of drilling the well. The joint venture between the parties is that the landowner contributes and leases his minerals. The working interest owners contribute their money and take the risk that the well will not be a dry hole.

When Act 434 attempts to exempt royalty owners, which exemption is further compounded by the Pass-Through Prohibition preventing the producer from charging the increased tax burden to the purchaser, the legal mandate requiring proportionate taxation is violated. The "producer" is required to pay a tax on the royalty owner's share of the production attributable to the royalty owner's ownership of the mineral fee and is restricted from passing on the unequal tax burden. The burden of the tax is, of course, magnified and progressively escalated depending upon the precentage of production to which the landowner is entitled. The evidence shows that some leases have royalty interest of as high as 54% and it is, to say the least, an irrational basis and an arbitrary classification to tax production in this manner. The lack of uniformity in this connection was discussed in *Ohio Oil Co. v. Wright*, 386 Ill. 206, 53 NE. 2d 966 (1944) where the Court said:

> The legislature, however, regarded the production of oil as including all the oil, not only by prescribing a tax upon the entire ownership, but by declaring the tax to be on 'all oil . . . produced in this State.' ***The operators are, of course, in fact producing all this oil, but do not own all of it. When we must exclude royalty the test of ownership fails in uniformity,*** for one operator may produce $1,000 worth of oil and own seven-eights 7/8ths) of it, another produce

> a like amount and, by reason of overriding royalties own six-eights (6/8ths) of its, and another under an oil-payment contract, own none of it but have an exclusive right to oil in another tract not yet drilled. Under these diverse conditions the ownership test would exact, respectively, per $1,000 value of production, $26.25 from one, $22.50 from another, and nothing from the third, yet all would produce the same amount of oil in value. ***Thus the measure of the tax is not uniform in application to the member of the class engaged in the tax occupation of producing oil,*** 53 NE. 2d at 973 (Emphasis supplied).

It is, therefore, clear that the attempt to exempt royalty and at the same time require that the "severer " (*i. e.*, the persons in charge of production, i. e., who are operators) bear and absorb all of a tax which is the legal equivalent of ad valorem taxes based on ownership, is arbitrary and capricious because it lacks uniformity of classification of those to be taxed. It is unequal and arbitrary to exempt one share of production and at the same time tax the remainder of the production from any given well or unit.

The foregoing authorities likewise condemn the classification of wells producing between 15,000 and 15,800 feet in the Smackover formation by virtue of the Smackover Proviso and the imposition of additional taxation on production from them. There is no way that the State can "demonstrate . . .that the classification is neither capricious nor arbitrary but rests upon some reasonable consideration of difference or policy." See ***Weissinger v. Boswell,*** 330 F. Supp. 615 at 623 (M.D. Ala. 1971). The classification established in the Smackover Proviso is comparable to other classifications which have been held arbitrary and unconstitutional, such as the "business college" tax classification in ***Birmingham Business College, supra,*** the tax

classification for hotels with 15 rooms and those with 30 rooms in *La Clede Hotel Co., supra*, the tax classifications in *Woco Pep* and *Alabama Consolidated, supra*, and the geographical tax classifications in *Weissinger, supra*, and *McCarthy v. Jones*, 449 F. Supp. 480 (S. D. Ala. 1978).

The evidence is undisputed that there is no rational basis for singling out wells producing from between 15,000 and 15,800 feet in the Smackover formation and subjecting such wells to discriminatory taxation. The deeper the well, generally the greater the drilling and completion costs, pressure and temperature. Act 434 treats differently wells producing from the Smackover formation and wells producing from other formations, even if the production is from the same depth (as is the case with respect to the Norphlet formation while wells of the Flomation Field in Escambia County). Act 434 treats differently wells producing from the Smackover formation at the 15,000 to 15,800 feet depth and wells producing from the same formation at greater depths (up to over 18,500) or at lesser depths (of about 10,000 feet). There is no difference geologically or otherwise in the characteristics of the wells, the formation(s), or the production to justify the Smackover Proviso. The Defendant made no effort to prove otherwise.

For the foregoing reasons, I find that the Royalty Owner exemption, the Pass-Through Prohibition and the Smackover Proviso separately and severally violate the Equal Protection Clause of the United States Constitution and the corresponding provisions of the Alabama Constitution. Therefore, Act 434 is unconstitutional and invalid.

VI. ACT 434 IS UNCONSTITUTIONAL BECAUSE IT IMPAIRS CONTRACTUAL OBLIGATIONS

The Royalty Owner Exemption and Pass-Through Prohibition are invalid and must be stricken on a second ground because they each violate both the federal and state constitutions

which expressly prohibit the State from "impairing the obligations of the contracts." Article 1, Section 10, Constitution of the United States; Article 1, Section 22, Alabama Constitution of 1901. Plaintiffs have leases which require under their terms that the severance taxes be paid pro rata by the landowner, and these leases antedate the enactment of Act 434. In addition, the Plaintiffs have sales contracts entered into prior to the effective date of Act 434 which specifically allow and require that the severance taxes are to be paid and/or reimbursed by the pipeline purchaser. The Royalty Owner Exemption purports to excuse the landowner/royalty owners from payment of their proportionate share of the increase in severance taxes, while the Pass-Through Prohibition provides that the tax must be borne and absorbed by the producer or severer of the oil or gas.

Article 1, Section 10 of the United States Constitution provides as follows:

> No state. . . shall. . . pass any law impairing the obligation of contracts.

Similarly, Section 22, Alabama Constitution of 1901, provides in relevant part as follows:

> That no . . .law impairing the obligations of contracts, . . . shall be passed by the legislature;
> . . .

The Supreme Court of Alabama long ago declared its opposition to governmental interference with private contracts under Article 1, Section 10 of the United States Constitution and in corresponding provisions of the State Constitution. In *Edward v. Williamson*, 70 Ala. 145, 151, 153 (1881), the Court said as follows:

> The plain purpose of these constitutional barriers,

> we think, was to preserve the sacred principle of the inviolability of contracts against that legislative interference which the history of governments has shown to be so imminent, in view of the frequent engendering of popular prejudice, and the consequent fluctuations of popular opinion. . . . [T]he prohibition [in the constitution] has no reference to *the degree* of impairment. The largest and the least are alike forbidden. (Emphasis original).

More recent cases have continued to affirm this principle of law and the Supreme Court of Alabama, in *White v. Associated Industries of Alabama, Inc.*, 373 So. 2d 616 (Ala. 1979), relied upon Section 22 of the Alabama Constitution of 1901 to strike down a statute requiring private employers to pay their employees for military leave up to 20 days per year for National Guard or Reserve duty in violation of their employment contracts. In this connection the Court said:

> It is impermissible for the legislature as a means to accomplish a legitimate end - - continue public protection by encouraging participation in the Guard or Reserves - - to enact a statute impairing the obligation of employment contracts. The means are not reasonably adapted to the beneficial end, thus, the statute is in violation of constitutional provisions forbidding impairment of contracts. 373 So. 2d at 620.

The federal cases are in accord. See *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U. S. 1 (1977). See also *Fleeman v. Case*, 342 So 2d 815 (Fla. 1976); *Allen v. Axford*, 285 Ala. 251, 231 So.2d 122 (1969); *Cole v. Pond Fork Oil and Gas Co.*, 35 SE. 2d 25 (W. Va. App. 1945).

The law is clear and the facts dictate that the Royalty Owner Exemption and Pass-Through Prohibition impair the pre-existing contracts of these Plaintiffs. Thus, on two grounds, equal protection and impairment of contract, the Royalty Owner Exemption and Pass-Through Prohibition must be stricken and held unconstitutional.

VII. ACT 434 VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

The Pass-Through Prohibition contained in Section 1(e) of Act 434 is invalid on a third ground because it violates the Commerce Clause of the United States Constitution. Article 1, Section 8, Clause 3 of the U. S. Constitution grants Congress the power to regulate commerce among the several states. This provision, commonly known as the Commerce Clause, reserves to the federal government the power to regulate interstate commerce and prohibits the states from directly interfering with it or attempting to regulate it. In ***International Textbook Co. v. Pigg***, 217 U.S. 91, 112 (1910), the Supreme Court stated as follows:

> It is the established doctrine of this court that a State may not, ***in any form or under any guise***, directly burden the prosecution of interstate business. (Emphasis supplied)

See also ***Grandin Farmers' Co-op Elevator Co. v. Langer***, 5F. Supp. 425 (D. C. N. D. 1934), ***aff'd Langer v. Grandin Farmers' Co-op Elevator Co.***, 292 U.S. 605 (1934).

Related to the powers of Congress under the Commerce Clause are the provisions of Article VI of the United States Constitution which provides in pertinent part that:

> This Constitution, and the laws of the United

> States which shall be made in pursuance thereof, . . . shall be the Supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary nowwithstanding .

In recognition of the authority of Congress under the Commerce Clause and the Supremacy Clause, the Supreme Court has frequently held that where Congress has adopted a comprehensive plan for regulating a particular aspect of interstate commerce, no power is left in the states to regulate that phase of interstate commerce in view of the all-embracing federal plan. ***Castle v. Hayes Freight Lines, Inc.***, 348 U.S. 61 (1954). This is particularly true where the state regulation conflicts with the federal plan of regulation. ***Burbank v. Lockheed Air Terminal, Inc.***, 411 U.S. 624 (1973).

On November 9, 1978, the Congress of the United States enacted the Natural Gas Policy Act of 1978, 15 U.S.C. §3301-3432 (Supp. 1979), establishing maximum lawful prices at the wellhead for all sales of natural gas, regardless of whether or not such sales are made in interstate or intrastate commerce. All sales of natural gas from wells within the State of Alabama became subject to the NGPA on December 1, 1978, the effective date of the Act. This Act provides in pertinent part as follows:

> . . .[A] price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this subtitle if such first sale price exceeds the maximum lawful price to the extent necessary to recover (1) State severance taxes attributable to the production of such natural gas and borne by the seller, . . .

The Act defines "state severance tax" for the purposes of the

Act as:

> 'any severance, production, or similar tax, fee, or other levy imposed on the production of natural gas. . . .

These provisions unequivocally indicate that Plaintiffs, pursuant to their contract, are entitled to "pass through" increases in severance taxes. Thus, the Federal Government has preempted the field of cost and pricing of natural gas and precludes the State of Alabama from legislating in this field. Therefore, the Pass-Through Prohibition is unconstitutional and is void.

VIII. ACT 434 VIOLATES SECTION 45 OF THE ALABAMA CONSTITUTION

Act 434 also violates Section 45 of the Alabama Constitution of 1901 which provides in pertinent part as follows:

> "Each law shall contain but one subject which shall be clearly expressed in its Title. . . ."

The title to Act 434 reads as follows:

> "To amend Code of Alabama 1975, Sections 40-20-2 and 40-20-8, so as to increase the rate of Tax; to provide further for distribution of the proceeds of the tax; and to provide certain exemptions from the increased rate."

From what has been said above, it is obvious that title to Act 434 covers more than one subject and that the title does not "clearly express" the subjects of the Act. The title makes no reference to any of the following matters:

1. The purported consumer protection and/or pricing

regulation in form of the prohibition against pass through contained in Section 1(e).

2. The provision requiring the "producer or severer" to absorb and pay the tax.

3. The extent of the increase of the tax.

4. The fact that the Act imposed differing tax rates on different production.

5. That producers would be required to bear the royalty owner's share of the tax.

6. The fact that the tax is not based on ownership of the mineral interest.

7. That purchasers would be prohibited from accounting for and paying the tax in derogation of the provisions of Section 40-20-3.

The provisions of Section 45 of the Alabama Constitution serve much the same purpose as does admission of legislative history, i. e., to prevent deception of the Legislature and to intelligently inform the members of the legislature of the full and true subject matter of the proposed legislation. ***Clutts v. Jefferson County Board of Zoning Adjustment***, 282 Ala. 204, 210 So. 2d 679 (1968); ***Bagby Elevator and Electric Company v. McBride***, 292 Ala. 191, 291 So. 2d 306 (1974); ***Alabama Education Association v. Board of Trustees of the University of Alabama***, 374 So. 2d 258 (Ala. 1979).

The title to Act 434 manifestly gives no "warning or notice"

with regard to the specific items mentioned above and particularly to the consumer pass through prohibition. The Act deals with several different subjects and the evidence admitted shows that neither the explanation of the sponsor, nor the title to the Act, apprised the legislators of all of the subject matter of the bill. Therefore, the Act must be stricken on this ground also.

IX. ACT 434 IS VOID FOR AMBIGUITY AND IS INCAPABLE OF RATIONAL ENFORCEMENT

The Court finds Act 434 is so vague, uncertain, indefinite, ambiguous, and conflicting with and repugant to other existing provisions of other statutes that it cannot be enforced on any rational basis and, therefore, must be stricken. The Act is vague, uncertain and conflicting with other statutory provisions in the following particulars:

(1) Section 40-20-1 (8) *Code of Alabama* 1975 expressly defines a "producer" as including a royalty owner, but Act 434, by implication, exempts royalty owners from the definition of a "producer" for certain purposes.

(2) Section 40-20-3 provides that the tax will be imposed in proportion to ownership. However, Act 434 contains an inconsistent and repugnant provision purporting to exempt royalty owners. Thus, one section of the law taxes the royalty interest while another purports to exempt royalty owner. The conflict is irreconcilable.

(3) Section 40-20-2 (b) levies the tax "upon the basis of the entire production in this state including what is known as the royalty interest." As has been noted, the tax is levied upon producers who are defined to include royalty owners. Yet Act 434 purports to exempt royalty owners. Again, the conflict is more than apparent.

(4) Pass-Through Prohibition prohibits pass through of the tax to "consumers" but consumers are not defined by the terms of the Act. In the next breath, the Act requires in mandatory language the producer to bear "exclusively" the tax "herein levied." Does this mean that the producer may pass the tax through to a non-consumer as the first portion of paragraph 1 (e) of the Act would imply, or does it by requiring him to "exclusively" bear this burden, prohibit him from passing through the tax to a party who neither uses nor consumes the product? This conflict is likewise irreconcilable.

(5) The provisions of paragraph 40-20-3 (b) require the ***purchaser*** to account for the tax. However, Act 434 in conflict therewith as has been pointed out, states that it must be borne exclusively by the producer. Accordingly, one provision requires the purchaser to account and another provision expressly prohibits transferring the burden of passing on the cost "either directly or indirectly."

(6) Section 40-20-3 (a) provides that the tax will be levied "in the proportion of their ownership at the time of severance," but the Pass-Through Prohibition in conflict therewith says it "will be borne exclusively by the producer." Again, the conflict is irreconcilable.

(7) The Royalty Owner Exemption provides that "any person who is a royalty owner shall be exempt. . . and shall not be liable therefor. Applied literally, any royalty owner (i. e., any person) is exempt even though he might also own a working interest.

(8) The Defendant has interpreted Act 434 in connection with the use of the word "increase" in the Smackover Proviso to apply only to the new well exemption immediately preceding it. On the other hand, Defendant has interpreted the word

"increase" in the Royalty Owner Exemption to apply in any case, not just those instances wherein a royalty owner would own an interest in a "new well." The fact that the Defendant has interpreted the word "increase" in these two provisions in differing manners indicates clearly that the act is conflicting, vague, uncertain and ambiguous.

(9) In the Smackover Proviso reference to depth "between 15,000 and 15,800 feet," there is no specification of whether the depth is to be measured from mean sea level, or the land surface, or the Kelly bushing, or the derrick floor, If the starting point is any one of the last three (as is the situation under certain Oil and Gas Board records), then hills and other surface variations could cause two nearby wells to be treated differently even though they produce from the same sub-sea depth in the same formation - - an irrational result. Yet the Act wholly fails to prescribe a uniform starting point and leaves the question of the proper starting point open to speculation.

Clearly, the Act is so indefinite, uncertain and ambiguous as to render the entire Act unenforceable. In ***Opinion by the Justices***, 249 Ala. 88, 30 So. 2d 14 (1947), the Supreme Court, in striking down an Act authorizing governing bodies of state and local government to contribute to premiums on group life insurance on officers and employees as ambiguous, set forth the rule prevailing in this state as follows:

> "It is a well recognized rule of law that in the enactment of statutes reasonable precision is required. Indeed, one of the prime requisites of any statute is certainty, and legislative enactment may be declared by the courts to be inoperative and void for uncertainty in meaning. This power of the Court may be exercised where the statute is so incomplete, so conflicting or so vague or indefinite that the statute

> cannot be executed and the court is unable by the application of law and accepted rules of construction to determine what the legislature intended by any reasonable degree of certainty."

Since the statute did not indicate what was meant by the term "governing body of every state department," nor did it specify what amounts of insurance would be purchased or the percentage of the premiums to be paid out of public funds, the Court applied the above quoted principle of law, in striking down the statute. See Also, ***Plant v. R. L. Reid, Inc.***, 294 Ala. 155, 313 So. 2d 518 (1975); ***Dewrell v. Kearley***, 250 Ala. 18, 32 So. 2d 812 (1947); ***Standard Oil Company v. State***, 178 Ala. 400, 59 So. 667 (1912).

X. ENTIRE ACT IS INVALID

Act 434 is unconstitutional and void for each of the separate reasons hereinabove discussed. The entire Act is invalid even though it contains a severability clause. The presence of a severability clause does not save an act or portions thereof if the remaining portions are not in accord with the legislative intent. In ***Ward v. State ex rel Lea***, 224 Ala. 242, 139 So. 416 (1932), the Court stated the following:

> "Nothwithstanding such saving clause, as to whether or not the valid portion of a statute is immune from the invalidating effect the law gives the inseparable blending of the bad with the good, is still a judicial question."

After analysis the Court concluded that there was "such an intimate relationship existing between all parts of the act as to create an 'inseparable blending of the bad with the good,' so that to strike [certain provisions] and leave the remainder would cause results not contemplated or intended by the lawmakers." The Court stated that therefore the whole Act

must be invalidated. Additionally, the Court stated the following:

> "But the real and vital question here is one of good faith and when so important features of the act (essential, we think, to the completion and fulfillment of the legislative intent) are condemned as affirmative local legislation under the guise of a general law, the infirmity is such as to permeate the whole act and work its destruction."

Similarly, in ***Alabama State Federation of Labor v. McAdory***, 246 Ala. 1, 18 So. 2d 810 (1944), the Court concluded that a severability clause should not be given effect if the remaining portions of the Act were in contravention of the obvious legislative intent. The following language is relevant:

> "We recognize the force of the argument that the separability clause should be given effect, where possible, to save the Act. But the principle is well understood that a clause of this character may not be invoked to save the Act when in contravention of the obvious legislative intent."

In ***Wilkinson v. Stiles***, 200 Ala. 279, 76 So. 45 (1917), the Court considered whether an act should be saved by striking out "a void exception, proviso, or other restrictive clause." The following language is relevant:

> "It is the general rule of statutory construction that if by striking out a void exception, proviso, or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative

> intent, and the whole would be affected and made void by the invalidity of such part. . . . If a clause in a statute which violates the Constitution cannot be rejected without causing the act to enact what the Legislature never intended, the whole statute must fall. . . . Here we have a clause expressly excepting cities of a population of 35,000 or more, and to strike said clause and uphold the rest of the act would extend the law to every city in the state, although the Legislature said that it should not do so."

In *McLendon v. State*, 179 Ala. 54, 60 So. 392 (1912), the Court considered a licensing statute which exempted "ex-Confederate soldiers." The exemption was held invalid under the Fourteenth Amendment to the Federal Constitution. The Court went on to hold that it would be improper simply to strike the exemption from the statute because it "would be in effect to make a statute materially different from that enacted by the Legislature."

In *Eliasberg Brothers Mercantile Co. v. Grimes*, 204 Ala. 492, 86 So. 56 (1920), the Court held that an income tax statute with rates of from 2% to 4% violated a constitutional prohibition against taxation at a rate greater than 65/100 of 1%. Then the Court considered whether the statute should be held valid to the extent of 65/100 of 1% although invalid as to the excess. As the following language indicates, the Court held that this should be done:

> [4] It is the view of the Chief Justice that the income provision, though void as to its levy in excess of 65/100 of 1 per centum, may nevertheless be upheld as a valid levy pro tanto. In our desire to avoid the complete nullification of this important legislative provision, we have

given serious and anxious consideration to that suggestion. We have, however, reached the conclusion that to declare it law in that amended form would be in effect nothing less than judicial legislation, and would be a dangerous departure from the settled rules that govern courts in respect to such legislation. The matter of its rate permeated every part and entered into every aspect of the levy. It is clear that the Legislature did not intend to tax all incomes alike, and whether they would have allowed any exemptions at all, or in what amounts, under a flat-rate levy of 65/100 of 1 per centum, and how they would have dealt with other features of the scheme, we cannot say except as a matter of the sheerest conjecture. If the matter were not complicated by these considerations, it is possible that a way could be found, under the decision of Wiley v. Parmer, 14 Ala. 627, to save the levy pro tanto.

* * *

It is better that the state should endure the loss and delay which must follow our ruling than that courts should exercise their at least doubtful discretion in adjusting, mending or reconstructing unconstitutional legislation.

In *A. Bertolla & Sons v. State*, 247 Ala. 269, 24 So. 2d 23 (1945), the Court stated the following:

Where the valid and invalid parts are so bound together that the invalid part is a material inducement to the valid portion, the whole is invalid.

The Smackover Proviso, the Royalty Owner Exemption and the Pass-Through Prohibition are all salient points of Act 434. They were not in the original bill but were added by amendment during the legislative process. They were all added at the same time. Each reflected a very important purpose of the legislature. It would violate the principles of the foregoing authorities to hold one or more of these provisions invalid but then to hold the remainder of the Act valid. Such a result would manifestly contravene the legislative intent. Accordingly, Act 434 is void and invalid in its entirety.

XI. ENFORCEMENT OF GAS SALES CONTRACTS

Plaintiff, Warrior Drilling and Engineering Co., Inc., has gas purchase contracts with Defendants Southern Natural Gas Company and Alabama Gas Corporation. Warrior's contract with Alabama Gas Corporation is dated May 1, 1978, and provides in Article IX, paragraph 9.2:

> Buyer will reimburse seller for one hundred percent (100%) of any increase in the total cost per Mcf. to seller occurring after the date of initial deliveries hereunder, occasioned by any change in the rate of existing severance tax, or by the imposition or substitution of any new excise taxes, including sales, occupation, severance, gathering, or other taxes of like nature in respect to the gas under this contract.

Warrior's contract with Southern Natural Gas Company is dated April 6, 1979 and provides in Article VIII, section 3:

> Buyer agrees to reimburse seller for one hundred percent (100%) of any taxes now and hereafter lawfully imposed upon and paid by seller with respect to the gas delivered hereunder subject to the further provisions of this Article VIII and

provided buyer is permitted to reflect such tax reimbursement in its jurisdictional resell rates.

Plaintiff Pruett Production Company also has a gas purchase contract with Defendant Southern Natural Gas Company, which said contract is dated August 1, 1979 and provides in Article VIII, Section 3:

> Buyer agrees to reimburse seller for one hundred percent (100%) of any taxes now and hereafter lawfully imposed upon and paid by seller with respect to the gas delivered hereunder subject to the further provisions of this article VIII and provided buyer is permitted to reflect such tax reimbursement in its jurisdictional resell rate.

Plaintiff Anderman Operating Company has a gas purchase contract with Coronado Transmission Company, dated June 25, 1979, which provides in Article X, paragraph 10.1 as follows:

> Seller shall pay all excise, severance, sales, occupation and other taxes of like nature levied in respect to the gas and handling thereof prior to the delivery to buyer, at the rate or rates existing as of the date of this contract. Nothwithstanding the provisions of this paragraph, in the event FPC, FERC, or successor body having jurisdiction allows reimbursement of current excise, severance, sales, occupation and other taxes of like nature, then buyer shall reimburse seller for all such taxes paid to the extent allowed by the agency having jurisdiction.

Defendant Southern Natural Gas Company and Coronado Transmission Company have failed and refused to reimburse the seller of gas, i. e., Warrior, Pruet or Anderman, as the case

may be, for any severance taxes paid by sellers including the old 4% in effect prior to Act 434. The Defendants, Southern Natural Gas company and Coronado Transmission Company, are relying on Act 434 in their refusal to reimburse any severance taxes paid by sellers pursuant to their respective gas purchase contracts. In view of this Court's finding that Act 434 is null and void for the reasons herein stated, it is the order and judgment of this Court and it is hereby ordered that Southern Natural Gas Company and Coronado Transmission Company pay the 4% severance tax due to sellers (Warrior, Pruet, and Anderman) since September 1, 1979, according to the terms of their respective gas purchase contracts.

Appropriate judgments will be entered in each case, and the parties in each case (Warrior and Southern Natural Gas Company; Warrior and Alabama Gas Corporation; Pruet and Southern Natural Gas Company; and Anderman and Coronado Transmission Company) are directed to confer among themselves in an attempt to agree upon the amount of reimbursement due and report to this Court within 10 days. The Court retains jurisdiction in the event the parties are unable to agree upon the amount of reimbursement.

ORDER

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that Act 434, 1979 Session Alabama Legislature. be and the same is hereby declared to be null, void, and unconstitutional in all respects and of no further force or effect.

It is further, ORDERED, ADJUDGED and DECREED by the Court that each of the Plaintiffs herein is entitled to a refund of the taxes paid by them under and pursuant to the provisions of Act 434 and the Defendant is hereby ordered to pay and refund to each of them the amounts so paid by each of said Plaintiffs, with cost of court herein to be taxed against the Defendant. Appropriate judgments will be entered in each case and the parties are directed to confer among themselves in an attempt to agree upon the amounts to be refunded and report to the Court within 10 days. The Court retains jurisdiction in the event the parties are unable to agree upon the amount of refund.

DONE at Montgomery, Alabama on this 12th day of June, 1980.

/s/ Perry O. Hooper
Circuit Judge

Act No. 79-434 H. 148–Hines

AN ACT

To amend Code of Alabama 1975, Sections 40-20-2 and 40-20-8, so as to increase the rate of tax; to provide further for distribution of the proceeds of the tax; and to provide certain exemptions from the increased rate.

Be It Enacted by the Legislature of Alabama:

Section 1. Code of Alabama 1975, Section 40-20-2, is amended to read as follows:

"§40-20-2. (a) There is hereby levied, to be collected hereafter, as herein provided, annual privilege taxes upon every person engaging or continuing to engage within the State of Alabama in the business of producing or severing oil or gas as defined herein, from the soil or the waters, or from beneath the soil or the waters, of the state for sale, transport, storage, profit, or for use. The amount of such tax shall be measured at the rate of six per centum of the gross value of said oil or gas at the point of production. All wells producing less than 26 barrels of oil per day shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production. All wells that come into production after the effective date of this Act shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production for a period of ten years after production begins. Ten years after production begins, such tax shall then be imposed at the rate of six per centum (6%) on such wells that go into production after the effective date of this Act. Provided, however, that said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation. (b) The tax is hereby levied upon the basis of the entire produc-

tion in this state, including what is known as the royalty interest, on which production the amount of such tax shall be a lien, regardless of the place of sale or to whom sold, or by whom used, or the fact that the delivery may be made to points outside the state; and the tax shall accrue at the time such oil or gas is severed from the soil or the waters, or from beneath the soil or the waters, and in its natural, unrefined, or unmanufactured condition. (c) A county, city, town or municipality of the state of Alabama shall not establish, levy, impose or collect as a condition of doing business or otherwise, any tax, fee, license or charge, whatsoever, directly or indirectly, on or with respect to the production, treating, processing, ownership, sale, storage, purchase, marketing, or transportation on any oil or gas produced in the state of Alabama and on which severance taxes have been paid to the state of Alabama, or upon the business of producing, treating, processing, owning, selling, buying, storing, marketing or transporting such oil, or gas or upon the ownership, operation or maintenance of plants, facilities, machinery, pipe lines, gathering lines or any equipment, whatsoever, which are, or may be necessary or convenient to the production, treating, processing, ownership, storage, sale, purchase, marketing, or transportation of such oil or gas; provided, that nothing herein shall be construed to prohibit, limit or restrict a county, city, town or municipality from imposing and collecting ad valorem taxes on any property, real or personal not otherwise now exempted by law; further, the limitation herein imposed upon counties, cities, towns and municipalities shall not apply to any county, city, town or municipality which does not receive a share of the severance tax under the provisions of this article. (d) Nothing contained herein shall be deemed to limit or to enlarge the authority of a county, city, town or municipality to levy taxes or licenses on oil refining facilities located therein or on the suppliers of services or goods not including oil or gas to those persons engaging in the business of producing, treating, processing, owning, selling, buying, storing, marketing or transporting such oil or gas. Any person who is a royalty owner shall be exempt from the payment of any increase in

taxes herein levied and shall not be liable therefor. (e) The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas."

Section 2. Code of Alabama 1975, Section 40-20-8, is amended to read as follows:

"§40-20-8. (a) Sixty-six and two-thirds per centum (66-2/3%) of the net amount of all taxes herein levied and collected by the department, after the same has been certified into the state treasury, shall be allocated and distributed by the comptroller to the credit of the general fund of the state and to the county in which the oil or gas was produced and to the municipalities therein in the proportion set out in the following schedule: (1) Twenty-five per centum (25%) of all taxes herein levied and collected on oil and gas produced from oil or gas wells located within any county, shall be allocated and distributed to each such county for county purposes or to be expended at the discretion of the county governing body. In all counties having a population of not less than 34,875, nor more than 36,000, according to the 1970 federal decennial census, such funds shall be allocated and distributed to the boards of education of the public schools in such counties on a pro rata basis as established by the number of children in net enrollment in the public schools during the prior school attendance year. In all counties having a population of not less than 16,000 nor more than 16,250, according to the 1970 federal decennial census, such funds shall be allocated and distributed as follows: Each year the first $150,000 shall be paid to the custodian of the county school funds and after the payment of said $150,000 each year the balance of said funds shall be divided and paid 1/3 to the custodian of the county school funds and 2/3 to the

custodian of the county general funds. (2) Ten percent (10%) of all taxes herein levied and collected on oil and gas produced from oil or gas wells located within the corporate limits or the police jurisdiction of any municipality shall be allocated and distributed to each such municipality. (3) Fifty percent (50%) of the first one hundred and fifty thousand dollars ($150,000.00) remaining, or any part thereof, collected per year under the provisions of this article to the state; forty-two and one-half percent (42-½%) to the county; and seven and one-half percent (7-½%) to municipalities therein on a population basis. (4) Eighty-four per centum (84%) of all additional sums collected per year under the provisions of this article to the state; fourteen per centum (14%) to the county; and two per centum (2%) to municipalities therein on a population basis.

"(b) Sixteen and two-thirds per centum (16-2/3%) of the net amount of all taxes herein levied and collected by the department shall be certified into the state treasury to the credit of the state General Fund.

"Sixteen and two-thirds per centum (16-2/3%) of the net amount of all taxes herein levied and collected by the department on oil and gas produced from oil or gas wells located within any county, shall be allocated and distributed to each such county for county purposes to be expended at the discretion of the governing body.

Section 3. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 4. This Act shall become effective on the first day of the second month after its passage and approval by the Governor, or its otherwise becoming a law.

Approved July 19, 1979
Time: 11:45 P.M.

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

EXCHANGE OIL AND GAS COMPANY, et al.,
Plaintiffs,

VS.

RALPH EAGERTON, Commissioner
of Revenue of the State of Alabama,
Defendant.

CV-79-1284-H, et al.

[Record p. 1371]

STIPULATION BETWEEN EXXON, GULF AND LOUISIANA LAND AND EXPLORATION CO. AND DEFENDANT

In the trial court Appellants (Plaintiffs below) Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company and Defendant stipulated to the following facts with respect to the contracts involved herein:

> 2. As of September 1, 1979, and at the present time, each of Plaintiffs was and is a party to several contracts pertaining to oil and gas produced in Alabama which contain provisions stating that the other parties shall pay, or reimburse Plaintiff for, certain production, severance, gathering, occupation or similar taxes. An example of these contracts is an Oil, Gas and Mineral Lease dated March 16, 1971, between The Louisiana Land and Exploration Company, as Lessee, and T. R. Miller Mill Company, Inc., as Lessor, a copy of which is attached hereto as Exhibit "A". At paragraph 3.9.3 thereof, the following provision appears:
>
> > Lessor shall bear and pay, and there shall be deducted from the royalties due hereunder, Lessor's proportionate royalty share of:

(a) All applicable severance, production and other such taxes levied or imposed upon production from the leased premises.

Another example is a Gas Purchase Contract dated February 15, 1971, as amended, between Humble Oil and Refining Company, Exxon Corporation's predecessor, as Seller and Florida Gas Transmission Company, as Buyer, a copy of which is attached hereto as Exhibit "B". Paragraph VI(2) thereof is illustrative of provisions in other similar contracts requiring other parties to reimburse Plaintiffs for any increase in production, severance, gathering, occupation or similar taxes. Paragraph VI(2) reads as follows:

Any sales, transactions, occupations, service, production, severance, gathering transmission, export or excise tax, assessment or fee levied, assessed or fixed by the United States or any State or other governmental authority and taxes of a similar nature or equivalent in effect (not including income, excess profits, capital stock, franchise, or general property taxes) in addition to or greater than those, if any being thereof levied, assessed, or fixed on the date of execution hereof, in respect of or applicable to all the natural gas to be delivered by Seller to Buyer underunder (sic) and which Seller may be liable for during any month either directly or indirectly through any obligation to reimburse others, are hereinafter collectively referred to as "additional taxes." It is expressly understood and agreed between the parties that so long as the additional tax shall be in effect Buyer shall reimburse Seller for such

additional tax. In the event all or any part of such liability of Seller is not determined or not determinable by the end of any month, then such additional amount required in respect to such liability not determined or determinable shall be set forth for all such months in any calendar year and a statement to be rendered by Seller to Buyer by April 1st of the following year and Buyer shall pay the amount due pursuant to such statement on or before May 1st of such following year.

Another example is a Casinghead Gas contract dated July 25, 1967, between Cities Service Oil Company, as Purchaser, and Gulf Oil Corporation, on behalf of Sellers, a copy of which is attached hereto as Exhibit "C". Paragraph 9.1 thereof reads as follows:

All production, severance, gathering, processing and other taxes (ad valorem taxes, Citronelle City Tax and Sales and Use Taxes excepted) relating to the gathering of Casinghead Gas and Extraction and sale of plant products from the Casinghead Gas sold hereunder and to the gathering and sale of residue gas shall be borne by Seller and Purchaser in the same proportion respectively that the parties from time to time share the proceeds from the sale of plant products derived from the processing of the Casinghead Gas in the plant, and residue gas.

3. A substantial portion of Plaintiff's oil and gas production is sold in interstate commerce to purchasers who are not consumers of oil and gas. Some of such purchasers, in turn, have sales contracts with others that provide for pass through of severance taxes.

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

EXCHANGE OIL AND GAS COMPANY, et al.,
Plaintiff

VS.

RALPH EAGERTON, Commissioner
of Revenue of the State of Alabama,
Defendant.

CV-79-1284-H, et al.

[1228] JOHN PEMBERTON

The witness, called in behalf of the Plaintiffs, was duly sworn to speak the truth, the whole truth, and nothing but the truth, and testified as follows:

DIRECT EXAMINATION

BY MR. SCREWS:

Q Please state your name for the record.
A John Pemberton.
Q And what is your occupation or profession, please?
A I practice law and I'm also the Clerk of the Alabama House of Representatives.
Q John, how long have you been Clerk of the Alabama House?
A I'm in my eighteenth year.
Q Did you, in response to a subpoena duces tecum, bring certain documents to court this morning?
A I brought copies of the documents you asked for.
Q Are these certified by you?

A I will certify them. I will swear that they are true and correct.

Q All right. What documents did you bring, please?

A I brought a record of every entry into the House of Representatives since this Bill was introduced that would affect the Bill, such as Adjournments, the Convening of the Legislature, the Vote on Bills, Special Order Calendar, and things of that nature.

Q And this is House Bill 148 of the '79 Session that ultimately ended up as Act 434?

[1229] A That's right. Yes, sir.

Q Does the package that you brought with you show when the Bill was first introduced, when it was reported out of the House Ways and Means Committee, when it was voted on the Floor of the House, when it was passed by the Senate, and a certain amendment added by the Senate which was concurred in by the House?

A Yes, sir.

Q And does the package that you have produced here also contain the Bill as finally enacted?

A A copy of it. Yes, sir.

MR. SCREWS: May it please the Court, we have a list of the exhibits that we have numbered and if it's not going to confuse the Court, we would like to introduce exhibits out of order, like, you know, we have this one marked as Exhibit 33, Plaintiffs' Exhibit 33, if that is all right with the Court.

THE COURT: As long as the Court Reporter is aware of the particular exhibit and the number. Just be sure to tell us when you do introduce one, giving the number and so forth.

MR. SCREWS: We would like to introduce that

packet of documents as Exhibit 33 for the Plaintiff.

(WHEREUPON, document entitled "Transcript of the House of Representatives, State of Alabama, Regular Session, 1979 on House Bill 148 - Act No. 434, marked for [1230] identification purposes as Plaintiff's Exhibit No. 33, was offered and received into evidence.)

MR. PEMBERTON: I would like to make one comment. You asked me if everything - - I don't have an enrolled copy of the Bill because we don't keep those after we adjourn, but the Bill with the amendment is in here. I was hesitating to what you just added, and it's in the Act, the slip Act that you have.

MR. BRECKENRIDGE: No objection.

Q Is the enrolled copy in the Archives and History now?

A The enrolled copy is the same as you have which is in the Acts and which I assume you have a copy of the slip Act itself.

Q Right.

A When we enroll a Bill we just simply add the amendments to it, or the substitutions, but I have a copy of the substitute and the amendment which is the same thing.

Q What does the Archives and History have pertaining to legislation at this time?

A Under the law, every Bill introduced in the House, and resolution, when the session ends, they are sent to theArchives and History. So they have the original Bill. They have the original substitute. They have the original amendment, and they have the original vote, but these are photostats of each original.

[1231] Q And the Archives will show the votes like your Exhibit 33 will show the votes taken?

A Yes, sir.

Q Do you have a copy of the original Bill as introduced on April 17, 1979 in your Exhibit 33?

A No, we have a copy of the title. Bills are introduced by title only. We do not put the original Bill but we put the substitute and all the amendments.

Q Let me show you a document marked as Plaintiff's Exhibit 1, which has H. 148 By Hines, 4/17/79, Referred to Ways and Means, and it's got the Sub 100 up in the right-hand corner. Is that the original Bill introduced?

A This is a copy of the original Bill. When the Bill was introduced, we, of course, give the Bill a number, the Speaker assigns it to a Committee, and the Bill is then sent back to one of my offices for duplication and we photostat it because we try to have at least one copy for every member and the lobbyists who are interested in these Bills. But this is a photostat of the original.

MR. SCREWS: We introduce Exhibit No. 1.

THE COURT: All right.

(WHEREUPON, copy of Bill, H. 148, Sub 100, marked for identification purposes as Plaintiff's Exhibit No. 1, was offered and received into evidence.)

Q Mr. Pemberton, were you present when Representative Hines made any statements to the Floor of the House regarding this Bill?

[1232] MR. BRECKENRIDGE: Objection.

THE COURT: All right. State your grounds, and you state

your grounds as to why you think it should be.

MR. BRECKENRIDGE: First of all, it would be hearsay, and second of all, it would be incompetent. The Legislature's intent should not be - - is not admissible in this court. The Court is going to be forced to look at the statute as it was ultimately passed and not what one Legislator thought or did not think he was doing, plus it's hearsay.

MR. SCREWS: Judge, this Bill, we think on its face - -

THE COURT: I mean, while it is hearsay, let me hear your other reasons. While it is hearsay, why would it be admissible in the first place?

MR. SCREWS: It would be admissible because the Bill is ambiguous. What the sponsor told the House of Representatives or the Committee that induced the House to pass the Bill, we think is pertinent legislative history. We are not asking what Representative Hines' opinion is or what his intent is, we are asking what representations he made that induced the House or the Ways and Means Committee or the Senate, as the case may be, to pass this Bill. And we think it is [1233] entirely permissible as part to obtain legislative intent under the Alabama cases particularly in view of the ambiguousness of the Bill on its face.

THE COURT: Which Alabama case are you speaking of?

MR. CROWE: Your Honor - - -

THE COURT: I mean, you all are basically interested in this, aren't you?

MR. CROWE: Oh, yes, sir.

THE COURT: Well, let me hear what everybody has to say.

MR. CROWE: I am quoting first here from Sutherland on Statutory Construction, the recognized work in this area.

It says in the -- incidentally, it is Section 48.15. "In the course of deliberation on a Bill, Legislators look to its sponsor as well as to the representative of the committee having charge of it as one who is expected to be particularly well informed about its purpose, meaning, and intended effect. In recognition of this reality of legislative practice, courts give consideration to statements made by a Bill's sponsor on grounds similar to those relied on to support the use of statements by the committeeman in charge of the Bill." [1234] In *Morris vs. State*, 122 So.2d 914, 1960 Supreme Court case, the Court said, and I quote: "In construing statute, it is our duty to examine the legislative history in order to ascertain the true intent of the law-making body."

And again, the Supreme Court speaking in *Morgan vs. The School Commissioner of Mobile County*, 26 So. 2d 108, said as follows: "In addition to the historical background shown by the enactments, the words of the members of the Constitutional Convention of 1901 uttered on the floor of the Convention are helpful in arriving at a correct construction of Section 270 of the Const -

tution."

Now, if this were a Federal Act we were speaking of, we would simply go to Washington and get a copy of the floor debate, the committee reports, have it certified, and put it up here as Exhibit No. 1 for the consideration of the Court.

Since the Alabama Legislature does not record the proceedings, we say that we are entitled and the Court, indeed, needs the background of this Act as these cases indicate, and as Sutherland indicates, to ascertain the intention of the Legislature, and all we're doing with this type of testimony [1235] is explaining what we would have by a witness who was present in lieu of a transcript of the proceedings. And in the Mobile County School Board case, they went into great detail that Mister so-and-so said so-and-so, and that Mister so-and-so- said so-and-so, and the sponsor said so-and-so, and from that evidence they construed Section 270 of the Alabama Constitution from the debate on the floor of the Convention, and, therefore, we say that this testimony as to what its sponsor said as Southerland indicates, it's a political reality. Legislators look to the sponsor to tell them what kind of Bill it is. And we think it's particularly relevant that it was the sponsor, and, therefore, we say it's admissible.

MR. BRASWELL: Your Honor, in addition to the two cases cited by Mr. Crowe as to the fact that it is the Court's duty to look at the legislative history, and the case whereby it is held appropriate to look at the words uttered on the floor of the Constitutional Convention, the two cases he mentioned, the case of *City of Montgomery vs.*

Graham states this:

"The Court may when construing a provision of the Constitution, look to the debates and proceedings of the Constitutional [1236] Convention."

And I think it is important to note that what we have here is testimony of something in formal legislative sessions, formal legislative happenings, as distinguished from a pure statement of intent or opinion of a Legislator. We have something comparable to on-the-floor utterances, debates, and something which, in fact, is part of the hard legislative history of the statute.

THE COURT: You are saying, not the opinion, but what they said at the time is what is admissible?

MR. BRASWELL: Yes, sir.

THE COURT: You construe that just like the Constitutional Convention when you had a lot of debates that were recorded in the Department of Archives. You're saying this is the same.

MR. BRASWELL: Very relevant. The same reason the Supreme Court held those debates and words to be relevant. In these cases the Court goes on quoting at length what was said by a certain person, what he said, and that is what we want to do.

THE COURT: All right.

MR. BRECKENRIDGE: Your Honor, first of all, I believe I can distinguish all of these cases that were

mentioned construing whether or not [1237] the remarks or comments made at the Constitutional Convention which are recorded and are on record should not apply in this case.

There is nothing formal here. Mr. Hines is not on the record anywhere where stenographic or certified copies of what was said are in existence. And I think the reason why the Court would not like to take this testimony, other than to hearsay objections, that the Court shouldn't get off into conjecture of what one Legislator thought he was doing and another Legislator said he thought he was doing after the Act was passed. Obviously, they voted for the language and they thought they were passing the statute and the Court can only look at the language as it was passed and not what they say later on that they thought they were doing.

Your Honor, I would cite to the Court the case of *James v. Todd*, 267 Ala. 495, 103 So.2d 19, in which the Supreme Court of Alabama considered whether the trial court erred in refusing to permit the introduction of the testimony of four members of the Legislature of Alabama concerning an enactment of Act 570 of the 1955 Alabama Session.

The proposed testimony of a Legislator was an intent to express their conclusions as [1238] to the motive, purpose and intent of the Legislature in passing an Act.

The Supreme Court of Alabama quoted with approval a case from Arkansas as follows: "The intention of the Legislature to which effect must be given is that expressed in the statute and the

court will not inquire into the motive which influenced the Legislature or individual members in voting for its passage, and knowing the need the intention of the draftman or the Legislature so far as it has not been expressed in the Act. So in ascertaining the meaning of the statute, the Court will not be governed or influenced by the view or opinions of any or all of the members of the Legislature or its legislative committees for any other purpose."

Your Honor, the big distinction that we've got between these cases here, they're talking about the Constitutional Convention with recorded testimony, so to speak, and this case, they're trying to get in something that is just pure rank hearsay of the highest form and I think the Court will exclude it, and I think it should.

MR. CROWE: One thing about the case that Mr. Breckenridge has cited, in that case the statute was held to be unambiguous, contrary [1239] to the case we have here, and the language of the Court if you read it in the *Todd* case excluded opinions as opposed to facts about what happened in the committee, what did the sponsors say in the committee, not an opinion as to the intention, but the the sponsor said I have a depth proviso in here to limit this Act to Escambia County. And under close reading of that case indicates that in a case of ambiguity, as we have here, certainly, the Court in interpreting the statute, even as the State has asked the Court to do, can look to debate and attribute the weight the Court may decide to attribute to the statements and/or proceedings in the Ways and Means Committee and on the floor of the House.

THE COURT: Let me hear from you, Mr. Braswell.

MR. BRASWELL: I made my point - - -

THE COURT: You may change my mind, or you may confirm what I am about to decide - - -

MR. BRASWELL: I wanted to point out that I don't think the distinction which Mr. Breckenridge sought to make between the Constitutional Convention and the Legislature is a valid one.

There are a number of Alabama cases, and we have referred to a number of them in our brief, referring to the legislative history in the Legislature. For example, in the [1240] *Morris* case, the Court looked to the minutes of a certain committee of the Legislature on the proposed Code. And in another case, the *T. R. Miller Mill Company* case, they looked to the report of a legislative interim committee on finance and taxation.

So, these happenings in the Legislature have been looked to by the Supreme Court just as the Supreme Court looked to the happenings on the floor of the Constitutional Convention, and they do so because what happened there is different from what someone had as a personal opinion. That's why the Supreme Court, in using the word debates, certainly acknowledges that there can be differences of opinion, and that a debate by its very nature is not a conclusive, hard, unquestionable position, and yet the Supreme Court of Alabama said these debates are relevant in interpreting the statute because what happened in the course of the formal consideration is relevant.

So, we didn't think there is any valid distinction between a Constitutional Convention and a Legislature because the courts have looked similarly to the happenings.

THE COURT: All right. You haven't changed my conclusion. You confirmed what I was about to state. It is my opinion that the objection [1241] should be overruled, and I so do, and we will hear what you have to say, Mr. Pemberton.

MR. PEMBERTON: What was the question?

Q Were you present on the floor of the House sometime in July, I believe, that your records will show that this Bill was debated on the floor of the House of Representatives?

A I was on the - - when the Bill was debated for passage, yes, sir, I was there.

Q Was Representative Hines, the sponsor, present?

A He was at the mike. It was his Bill and he was handling the Bill.

Q What did Representative Hines tell the House of Representatives?

A There had been some objections to the Bill, to the best of my memory, before it was amended in the Ways and Means. The Bill that came out with a substitute by the Ways and Means Committee. And Mr. Hines took the floor and he stated in effect that the objections had been removed by the substitute Bill, the substitute Bill clarified and made the Bill apply to one county only.

Q Did he identify the county?

A Yes, sir, Escambia.

MR. SCREWS: That's all.

[1242] FURTHER DIRECT EXAMINATION

BY MR. BRASWELL:

Q Mr. Pemberton, this particular Act and the Bills leading up to it were not published as required for local laws?
A They were not published.

MR. BRECKENRIDGE: Objection.

THE COURT: Just a minute.

A The Journal will show you that - - -

THE COURT: Wait, I haven't ruled. Let me hear your grounds.

MR. BRECKENRIDGE: There has been no proper predicate laid, Your Honor. He has't asked him whether he knows that or not, whether he knows they have been or have not been. I believe Mr. Braswell has laid an improper predicate.

THE COURT: Well, do you know?

MR. PEMBERTON: I know what the Journal shows.

THE COURT: Well, let's see what the Journal shows then.

Q What does the Journal show?
A The Journal shows that it was not advertised as a local Bill.

MR. BRASWELL: No further questions.

THE COURT: Anybody else like to ask him some

questions?

MR. SEALE: We have no questions.

MR. BLACK: No questions.

[1243] MR. SEALE: Your Honor, for clarification, Exhibits 1 and 33 were admitted, were they not, sir?

MR. CROWE: We offer them now, Your Honor.

THE COURT: All right. They are in.

[Record page 1243]

MILO B. HOWARD, JR.

The witness, called in behalf of the Plaintiffs, was duly sworn to speak the truth, the whole truth, and nothing but the truth, and testified as follows:

DIRECT EXAMINATION

BY MR. SCREWS:

Q Please state your name for the record.
A Milo B. Howard, Jr.
Q And, Mr. Howard, what is your occupation or profession?
A I'm Director of the Alabama Department of Archives and History.
Q Were you served a subpoena duces tecum early this morning to produce certain records from the Department of Archives and History pertaining to Act 434, House Bill 148, of the session of the Legislature of last year, of '79?

A Yes, sir.

Q Do you have those documents with you?

A Yes, sir.

Q Mr. Howard, first of all, will you tell the Court what role the Department of Archives and History has with maintaining records of legislative Acts?

A At the end of each session of the Legislature, all of [1244] the Bills which have become law are sent to the Department by the Secretary of State. Those Bills which have failed the passage are sent to the Archives and History Department insofar as they exist by the Clerk of the House and the Secretary of the Senate Depending upon in which House the Bills died. We file all of the Bills by their Bill number in numerical order without regard to Act numbers because it's simply the easiest way to keep up with. Every Bill introduced in the session, that's the only place that you can find, in some instances, Bills that did not pass. Any paper relating to that Bill, that is, an amendment or substitute, or everything that we have is filed in the same folder. The folder is given the Bill number, and all relevant papers are filed in that folder.

Q In Bills that are intended to generate revenues, do your folders also include the fiscal notes from the Fiscal Office of the Legislature?

A They should. Ordinarily, the fiscal note is attached to the Bill in its jacket, and we receive that. Now, if the fiscal note is somehow detached and does not come to us, of course, we cannot have it.

Q Do you have a copy of the documents pertaining to House Bill 148?

A In the file are two Bills that came to the Archives and History Department, and I also have copies, Xerox copies, of them so that if it please the Court, the -- you all may have the copies. I would like to take the originals [1245] back to go in our files.

MR. BRECKENRIDGE: The Commissioner has no objection to that, Your Honor.

THE COURT: All right.

Q We have marked the package that you have produced, Mr. Howard, as Plaintiff's Exhibit No. 4. Let me go over these briefly with you. The first document entitled "House Bill 148, Sub 100, dated April 17, 1979" has already been identified by Mr. Pemberton as the original Bill introduced in the House. Is that correct? Do you know that?

A I don't know that.

Q All right. On the rear of your copy you have shown that it passed the House of Representatives in substituted form on July 12th of '79.

A Yes, sir.

Q And the next document is a one page document that shows an amendment to House Bill No. 148, the pertinent dates on that document being July 19 with the amendment adding a severability clause apparently by the Senate. - - -

A Yes, sir.

Q - - with a concurrence by the House of Representatives.

A Yes, sir.

Q And then on the second set of documents there is a fiscal note from the Finance and Taxation Committee signed by Mr. Pearson, Chairman of that Committee, dated July 17, 1979.

A Yes, sir.

[1246] Q And the fiscal note, of course, speaks for itself showing that the Bill will increase oil and gas production privilege taxes by $1,730,000 per fiscal year.

A Yes, sir, that's what it states.

Q And the third page of the second set is a Fiscal Note

signed by Mr. Walter Owens, Chairman of the Ways and Means Committee, dated June 7, 1979, showing that House Bill No. 148, as substituted, will increase the oil and gas production by an estimated $5,400,000 per fiscal year.

A Yes, sir.

Q And then finally, you have what has been, I believe, previously identified by Mr. Pemberton in his documents a copy of the final Bill as passed?

A Yes, sir.

Q Showing the various dates on which the Bill was read before both Houses, the dates it was reported out of various committees, and so forth. Is that correct?

A Yes, sir.

Q And Exhibit 4 is a copy of what you have in your file?

A Yes, sir.

MR. SCREWS: We offer Exhibit 4.

THE COURT: All right, sir.

(WHEREUPON, copies of the Department of Archives and History documents pertaining to House Bill 148, marked [1247] for identification purposes as Plaintiff's Exhibit No. 4, were offered and received into evidence.)

MR. SCREWS: That's all.

MR. BRASWELL: No questions.

MR. BLACK: No questions.

MR. SEALE: No questions.

MR. BRECKENRIDGE: No questions, Your Honor.

MR. SCREWS: May it please the Court, may we excuse Mr. Howard?

THE COURT: He's excused.

MR. BRECKENRIDGE: The Defendant has no objection.

THE COURT: All right.

MR. CROWE: Your Honor, at this time, we want to offer the Deposition of Mr. Rex McDowell on file with the Court that I believe was offered at an earlier hearing, and we would like to mark that as Exhibit 24, and with the Court's indulgence, we would like to read just a portion of that to the Court with Mr. Screws acting as the witness.

THE COURT: All right.

MR. BRECKENRIDGE: Your Honor, the State would like to ask the Plaintiff for what purpose they intend to introduce this evidence.

MR. CROWE: To establish the legislative history.

MR. SCREWS: The original deposition was marked as Plaintiff's Exhibit 10 in the hearing on the [1248] Injunction, and it is marked as Exhibit 24 in the trial of this case.

THE COURT: All right.

[Record page 1248]

DEPOSITION OF REX McDOWELL

MR. CROWE: Page 8, Line 4.

Q For the record, state your name and address, please, sir.

A My name is Rex McDowell. I reside at 2506 Went worth Drive, Montgomery.

Q And by whom are you employed?

A I am employed by the State of Alabama, specifically the Legislative Fiscal Office.

Q And what is your title, job description with the Fiscal Office?

A Okay, I am the Director of that Office.

Q I understand that you are about to move and leave the State of Alabama?

A Yes.

Q Do you know what date you will be leaving?

A Possibly this afternoon. No later than Wednesday.

Q And where will you reside after you leave Montgomery?

A In Washington, D.C.

Q And what job are you taking in Washington?

A I have accepted a position with Price-Waterhouse in their National Advisory Services.

Q How long will you be with Price-Waterhouse in Washington; I mean, if we wanted to contact you, could we contact [1249] you through Price-Waterhouse?

A Yes, I will be there for a year.

Q How many people are employed by the Alabama Fiscal Office?

A Our staff is designed around about thirteen people, twelve to thirteen people. It fluctuates. We have little turnover, but it's usually around thirteen people.

Q Where are the offices of the Alabama Fiscal Office located?

A In the basement of the Capitol, specifically in Room 6 and 7.

Q Is the Alabama Fiscal Office authorized by statute?

A Yes.

Q Is it set up under statute?

A Yes.

Q Could you briefly tell us what the functions of the Fiscal Office are?

A We have three general responsibilities. One is to provide fiscal estimates, the fiscal impact of legislation during the legislative sessions and prior to legislative sessions. The second general responsibility area is in budgeting analysis. And the third general responsibility area is just to provide any other kind of fiscal data or studies that the Legislature might require.

Q More specifically, do you provide the Legislature with estimates of revenue to be derived from all revenue measures introduced in the House and Senate?

[1250] A We provide fiscal notes for all revenue measures in which the committee requests a fiscal note.

Q Under the rules of the House and Senate, do you and the people in the Fiscal Office have floor privileges?

A Yes.

Q Do you know whether the rules of the House and Senate provide that every measure - - every revenue measure will have a fiscal note attached?

A I believe that they do; however, it's up to the Committee Chairman to made sure there is a fiscal note on the Bill. It's not impossible for a Bill to go through without - - for a minor Bill to go through without a fiscal note.

Q I'm going to show you what appears, Mr. McDowell, to be Rule 8 of the Joint Rules of the two Houses of the Legislature and ask you if you have ever seen that?

A Yes.

Q And that does give both you and the Legislative Reference Service privileges of the floor?

A Yes.

Q Okay, How long have you been the Director of the Fiscal Office?

A Since June 1st of '78.

Q What was your position before that time?

A I was Assistant Director, the title was House Fiscal Officer.

Q And how long did you hold the position of House Fiscal Officer?

[1251] A Between July 15, 1975 and moving up to the Director's post in '78.

Q I'm going to show you now the Rule of the House of Representatives, being Rule 63 and ask you if you have seen that Rule?

A Yes.

Q Now, that Rule in essence provides that every Bill increasing the revenue shall have a fiscal note attached, does it not?

A Right.

Q Could you tell us for the record when a Bill is passed whether or not the fiscal notes are physically appended or affixed to the Bill or the Act?

A The Bill - - if the fiscal note is actually attached to the Bill, but that's primarily to facilitate the clerk or the secretary keeping up with the fiscal note itself. The fiscal note does not become a part of the Bill or in no way has any weight of the law.

Q But it is attached physically?

A It is physically stapled to the Bill primarily to enable the Clerk of the House or Secretary of the Senate to keep up with the fiscal notes.

Q You were served with a subpoena to bring with you your records; did you receive the subpoena?

A Yes.

Q And have you brought with you all the records that pertain to House Bill 148 of the 1979 Session of the Legislature?

[1252] A Yes.

Q I will ask the reporter to mark this document - - let's call it Fiscal Office One. Mr. McDowell, I am going to show you the document marked as Exhibit One and ask you if you can identify it for the record?

A This appears to be all the information and the complete file about House Bill 148 which probably - - this original was probably in Archives now.

Q Whose stamp appears on there, if you can decipher it? I cannot read it .

A It's a stamp of the Department of Archives and History.

Q All right. Now, attached to - - I'm going to ask the reporter to mark this Exhibit One - - let's see - - now, on pages two and three I see a document or a page entitled Fiscal Note. Are those the fiscal notes that are generally prepared by your office in connection with the tax increasing measures?

A Yes.

Q Now, there is one fiscal note on page three, dated 6/7/79, signed by Walter Owens estimating revenues of 5.4 Million Dollars per fiscal year for this Bill. And there's another one on page two estimating revenues for 1.730 Million Dollars per year signed by Richard Pearson, Chairman of the Senate Finance Committee - - Finance and Taxation Committee. Right?

A Right.

Q Could you tell us why there are two fiscal notes under different dates using different amounts attached to [1253] Act 434?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule your objection.

A The reason for the two fiscal notes in this particular case is because we received information that changed how we interpreted the State of Alabama would administer this law. And our original estimate was contained in the fiscal note dated June 7 of '79. Subsequent to preparation of that fiscal note, it's my understanding that we received information from the Revenue Department that led us to believe that the Revenue Depart-

ment would administer this Bill on a local basis or pertaining only to one county which we felt would significantly reduce the amount of revenue received.

Q And which county was that?

A I believe it's Escambia County.

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule your objection.

Q I'll ask the Reporter to mark this document as Fiscal Office Exhibit Number Two. Now, I'm showing you, Mr. McDowell, Exhibit Number Two, a copy of a memo taken from your file as produced today, being a memo entitled, From Victor to Rex, dated August 30, '79, RE: Fiscal Notes to H.B. 148. Do you recognize that as being a document taken from your file?

A Yes.

Q In the last sentence of Exhibit Number Two it says, "The note was then changed upon contacting officers [1254] of the Department of Revenue who had accepted the Escambia County interpretation as the intent of the Bill." Is that right?

A Yes.

MR. CROWE: Now, we are agoing to offer as Exhibit 7 the Fiscal Note - - I mean the Memorandum attached as Exhibit 2 on file with Mr. McDowell's deposition.

THE COURT: All right.

MR. SCREWS: And for the record, the Exhibit 1 to McDowell is the same as Exhibit 4 which was the Archives and History record.

MR. CROWE: Pertaining to the Fiscal Note.

(WHEREUPON, Memorandum dated August 30, 1979, To: REX, From: Victor, Re: Fiscal Notes to H. B. 148, marked for identification purposes as Plaintiff's Exhibit No. 7, was offered and received into evidence.)

Q Now, is that what you meant a minute ago when you said that you had received certain information from the Department of Revenue accepting the reduction in the revenue?

A Correct.

Q Could you tell us who was contacted and gave that opinion or interpretation in the Department of Revenue?

A It's my understanding that Victor Vernon, after a meeting of Finance and Taxation Committee, in which [1255] this Bill was given a favorable report, saw two gentlemen with the Revenue Department, Lewis Easterly who is the Secretary, I guess, of the Revenue Department, and also the Director of the Research Division and who represents the Revenue Department before the Legislature, generally. And I believe another gentleman by the name of Jack Mann was with him. At that time Victor inquired of them because we had a question as to whether or not our interpretation was correct. We felt that even if we read the Bill one way and the Revenue Department was going to interpret it another way, we felt that the best information would be actually how the State was going to interpret the Bill. So, Victor at that time asked Mr. Easterly and Mr. Mann how they anticipated that the Revenue Department would administer the Bill. And we were told at that time - - or Victor was told at that time that it would be administered only as it pertained to Escambia County.

Q Who is Victor Vernon?

A Victor Vernon is the Analyst in the Legislative Fiscal Office who has done all the research on House Bill

148.

MR. CROWE: Page 19, Line 22.

Q I'll ask the Reporter to mark this document as Exhibit Number Three, Fiscal Office Exhibit Three. I'm going to show you the document marked as Exhibit Number Three which was taken from your files as produced today, Mr. McDowell, and ask you if you recognized it and can identify it?

[1256] A This appears to be a letter from Richard Raymond, Petroleum Engineer with the Oil and Gas Board to Brooks Hines giving him an estimate of oil production in Escambia County.

Q And any other production?

A Production statewide.

MR. CROWE: I offer at this time Plaintiff's Exhibit No. 8, the exhibit just identified as Exhibit 3 to the deposition of Mr. McDowell.

THE COURT: All right.

(WHEREUPON, Letter dated May 1, 1979, to Honorable Brooks Hines from Richard N. Raymond, Petroleum Engineer of the State Oil and Gas Board, marked for identification purposes as Plaintiff's Exhibit No. 8, was offered and received into evidence.)

Q And that letter is dated what date?

A May 1st, 1979.

Q How did you come into a copy of that letter?

A Apparently Victor Vernon got a copy of this letter, either from the Oil and Gas Board or from somebody else to assist him in preparing the fiscal note.

Q On page five of Exhibit Number One, the Bill itself

or the Act itself provides in part, "Provided, however, that said additional increase shall be limited to those [1257] oil and gas wells from between 15,000 and 15,800 feet in the Smackover Formation." Is that right?

A Yes.

Q Did you or Mr. Vernon make any effort to investigate to determine the meaning of what the Smackover Formation is?

A We have made a determination. Now whether or not the determination was made or exactly when the determination was made, I don't know. I understand that the Smackover Formation is - - would produce oil under Escambia County now.

Q At those depths?

A At those depths. Now whether or not I knew that before the Bill was amended in the Ways and Means Committee - - I'm pretty sure I didn't know that then.

Q Do you know the source of where you got that idea from?

A I believe I was given that information by Mr. Hines subsequent to the Bill's passage.

Q And Mr. Hines is a State Legislator?

A Yes.

Q What county does he represent?

A Escambia County.

Q And was he the sponsor of the Bill or the Act as attached as part of Exhibit Number One?

A Yes.

Q Mr. Hines gave you this information directly?

A I believe so, yes.

Q Did you ever meet with Mr. Easterly or Mr. Mann yourself, [1258] personally, or was that strictly Mr. Vernon?

A Yes.

Q That was Mr. Vernon?

A Yes. I had no correspondence with them personally

on this.

Q What is the date of the last fiscal notes? There are two fiscal notes. I think you have them right there in Exhibit One.

A Be 7/17/79.

Q Do you know where on July 17th, '79 this legislation was in terms of which House, what committee, where it was in the legislative process?

A It is probable that the Bill was reported out of the Finance and Taxation Committee on the Floor of the House on 7/17/79. We generally physically prepare our fiscal note - - which this date is an indication of - - on either the day that the committee meets or the day after.

Q That's the second fiscal note. Right?

A Yes.

Q And you think it was on the floor of the House at that time?

A No, I think it was on the floor - - it was being reported to the floor of the Senate.

Q Okay, being reported to the floor of the Senate. Now, referring to Exhibit Number Two, the last paragraph that we have previously discussed that the note was changed upon contacting the officers of the Department [1259] of Revenue who had accepted the Escambia County interpretation, does that mean that Mr. Mann and Mr. Easterly were probably contacted in the vicinity of July 17, 1979?

A Yes, sir.

Q I may have asked you this, stop me if I have, but do you know what Mr. Mann's function is with the Department of Revenue?

A If I'm not mistaken Mr. Mann is in the Research Division, but specifically what he does, I don't know.

Q What do they research as a general proposition?

A They research legislative proposals, for one thing. They do, as I understand it, cost studies for the Revenue Department. I think they were directly involved

in implementing a major management change in their work - - in putting their clerical functions on a word processing system.

Q Is he the head of that branch of the department?

A Mr. Easterly is.

Q Mr. Easterly is. Now, if you will refer to your file that you have produced, I see a number of memos, handwritten, on stationary of the Legislative Fiscal Office, four to be exact. Are those notes in your handwriting or Mr. Vernon's?

A These are in Mr. Vernon's handwriting.

Q All of them?

A Yes.

Q Do you know or can you tell us, Mr. McDowell, how the [1260] computation of the last and final fiscal note estimating revenues of 1.7 Million were actually calculated mathematically?

A Mr. Vernon used information, I'm sure, from the Oil and Gas Board relating to Escambia County, just made an estimate of revenue that would be produced as if this Bill only applied to Escambia County.

Q Okay. But you don't know anything about exact calculation. Mr. Vernon would have to tell us about that?

A Yes.

MR. CROWE: Page 28, Line 17.

Q If Mr. Vernon did not attend either the House Ways and Means Committee, the meeting of the Senate Finance and Taxation Committee, would somebody else in your office, Mr. McDowell?

A Yes. I'm not sure that Mr. Vernon did not attend the Ways and Means Committee meeting. I was in attendance. I was called out of the meeting, it seems, for some problem in our office.

MR. CROWE: Page 29, Line 16.

Q You don't recall. Incidentally, what is local courtesy, if you know?

A Well, it's been interpreted so many different ways that - - my interpretation of local courtesy is that no member of the Legislature votes on a Bill which only - - which does not affect the area he represents. For instance, if a Bill only affects Jefferson County, then local courtesy, this precedent requires that only [1261] Jefferson County Legislators vote on that piece of legislation.

Q Okay. Do you recall in the House Ways and Means Committee, before you left, whether there were any amendments or substitutes being offered with respect to Act 434, at the hearings?

A Okay. The - - I believe the Bill was substituted in the Ways and Means Committee, but I don't recall if it was substituted before I left or after I left.

MR. CROWE: Line 15.

Q Were you the only member of the Fiscal Office present at the House Ways and Means Committee meeting?

A We generally have a clerk there who would not have really kept up with the specifics. We have a clerk attend all of the Money Committee meetings so that we will have a record of all amendments and the Bills that are passed. We have some deadlines that we have to meet and we have found that the best way to meet those deadlines is to have a clerk present to give us a record of what has been done in Committee. The deadlines are generally the next morning at 9:00 or 10:00 when the House convene.

MR. CROWE: Page 32, Line 15.

Q I will ask the reporter to mark this document as Exhibit Number Four. I'm going to show you the document taken from your file produced today marked as Exhibit

Number Four, Mr. McDowell, and ask you if that is in your handwriting?

[1262] A No, this is Mr. Vernon's handwriting.

Q Can you indentify that document?

A It appears to be the rough draft of Exhibit Two.

MR. CROWE: That would be the memo previously marked from Mr. Vernon to Mr. McDowell, Your Honor, as Exhibit No. 7.

Q And that was written out by Mr. Vernon then?

A Yes.

Q Is it a fair statement to make, Mr. McDowell, that at first the Bill was construed to apply to all production in the State?

A Yes.

Q And that later it was construed to apply only to production in the interval between 15,000 and 15,800 feet, and thirdly, that it was again - - the construction was changed and it reverted to one of statewide application?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule your objection.

A Well, that's my understanding, that the Revenue Department has made the third interpretation.

Q So, the third interpretation, the one that this lawsuit is about, is actually interpretation number three. Right?

A Yes.

Q Do you know when this Bill was first introduced whether or not it had the depth proviso dealing with production between 15,000 and 15,800 feet that we discussed a minute ago?

[1263] A If I could have that file I will - -

Q Okay. I think my question is this. Was that depth proviso put in as a substitute Bill in the House Ways

and Means Committee?

A It is my understanding it was.

Q And that was not in the Bill prior to that time?

A Yes.

Q So, before the depth proviso was put into the Bill, the Fiscal Office issued a fiscal note estimating revenues on a statewide basis. Is that a fact?

A Yes.

Q After the depth proviso was put in by substitute, in the House Ways and Means Committee, the Fiscal Office issued a second and final fiscal note reducing the revenues estimated to be derived from the Bill to those emanating from Escambia County?

A That's almost correct. We estimated the second fiscal note - - prepared the second fiscal note, really with two points of information. One is the proviso that you referred to and the second is the Revenue Department's interpretation of that proviso. We did not change the fiscal note after it - - after the Bill left the Ways and Means Committee, and I think this is the point in question with our office, we were not convinced that the amendment that was placed on the Bill or the substitute Bill did what it was the impression of some of the members of the Legislature that the Bill did.

[1264] MR. CROWE: Page 35, Line 15.

Q Who, if you know, overruled the interpretation placed on the Bill in the second fiscal note and when?

A Well - -

Q To go back, who made the interpretation number three?

A The Revenue Department.

Q Do you know any particular individual?

A No, I don't.

Q Do you know when that was done?

A No, I don't. After the Bill was passed we would have little to do with it other than to make revenue estimates for the State General Fund Budget. And it was

only at that time that we understood that the Revenue Department had made - - when we were making our estimates last Fall, that we understood that the Revenue Department had interpreted the Bill to be statewide, because we felt like there would probably be some question, I think we didn't - -

Q You say you thought there would be some question?
A Well, we understood there was a suit being filed, and because of that we took that into consideration about our revenue estimates for the General Fund.

MR. CROWE: Page 37, Line 22.

Q I'm going to show you, Mr. McDowell, the document marked as Exhibit Number Five extracted from your file pursuant to subpoena, and ask you if you can identify that for the record?
A All right. There is a copy of an estimate which is an [1265] estimate which is an estimate which is prepared by the Revenue Department regarding House Bill 148.

MR. CROWE: Page 38, Line 19.

Q I notice in addition that this document states, "The caption does not agree with the body of the Bill as it does not mention the exemption above." What does that mean?
A Okay. Apparently here the Revenue Department is referring to an omission, if you will, from the title of the Bill regarding one of the features of the Bill which specifically was exempting oil wells producing less than twenty-six barrels a day from the provisions of this tax increase.
Q Okay. And they are implying, I guess, that that omission may be a fatal legal defect?

MR. BRECKENRIDGE: Objection.

A I don't know what he is implying there.

THE COURT: Overrule your objection.

MR' CROWE: Page 39, Line 20.

Q Just a minute. I believe you told us earlier in your testimony that you either met with or spoke to Representative Hines?

A I'm sure that I would have had occasion all during the session to meet with him. Now, I can't remember if we specifically talked about this Bill. The reason that we even re-evaluated this Bill is becasue I, at some point during the session, became aware that the intent [1266] of the Bill or the intent of the sponsor was to make this Bill apply only to Escambia County.

Q You became aware of that early in the session, you say?

A I became aware of this after the Bill had left the Ways and Means Committee. And now, whether or not it had passed the House and was resting in the Senate, I don't know, but it was after the Bill had passed the House Ways and Means Committee and prior to the time the Bill had passed the Finance and Taxation Committee. I can't remember - - I have so many conversations during a legislative session with so many people I can't remember whether or not my impression was due to a conversation with Mr. Hines or someone else.

Q But this is rather firmly fixed in your mind?

A Yes. I was the one that initiated a re-estimation on the Bill.

Q Oh, this was at your request?

A Yes.

Q Your initiation?

A Yes. I asked Mr. Vernon to check to see if he felt

that the Bill only had local interpretation.

MR. CROWE: Page 42, Line 4.

Q Mr. McDowell, all the records that we have identified, I believe it's one through five, exhibits, are those record that are kept in the regular course of your business in the Fiscal Office?

A Yes.

[1267] Q And are you the official custodian of all of those documents?

A Yes.

Q And are they kept by you under your direct supervision and control?

A Excuse me?

Q Are they kept by you under your direct supervision or control?

A Yes.

Q Okay.

A With one exception. This Exhibit One, of course, is not under my control. This would be - - during the legislative session, Exhibit One would be - - which is the actual Bill going through the Legislature, would be under the direct control of the Clerk of the House and the Secretary of the Senate. - -

MR. CROWE: For the record, Your Honor, that would, again, be the Archives and History record exhibit.

A - - until such time as it's passed by both Houses and then it will go to the Governor's Office and be signed by the Governor, and then go to the Secretary of State, and then I presume go to the Department of Archives and History.

Q But the two fiscal notes which are marked as pages two and three of Exhibit One are - -

A They were prepared by the Legislative Fiscal Office.
Q I didn't put in separate copies but you do have those
[1268] precise fiscal notes that we have discussed in your official file?
A Yes.
Q And the same thing would apply to Victor's calculations, they were part of your file and brought with you today pursuant to the subpoena?
A Yes.

MR. CROWE: Page 44, Line 3, by Mr. Braswell.

Q I will ask the court reporter to mark as Fiscal Office Exhibit Six a document consisting of two pages, the first being the fiscal note dated 7/17/79 which contains the lower estimate of One Million Seven Hundred Thirty Thousand Dollars, and the second page being a yellow legal size piece of paper with handwriting and figures on it.

MR. CROWE: Mark this exhibit as Plaintiff's Exhibit No. 9, and I offer it in evidence.

MR. SCREWS: That's the same as Exhibit Six of the McDowell deposition.

(WHEREUPON, Fiscal Note, dated 7/17/79, marked for identification purposes as Plaintiff's Exhibit No. 9, was offered and received into evidence.)

Q Mr. McDowell, the first page of this exhibit is the actual fiscal note, fiscal note that was prepared as a revision to reflect the Escambia County production only instead of the statewide production. Is that right?
A Correct.

[1269] Q The second page of this exhibit shows the calculations whereby this estimate was reached?

A Yes.

Q And further down on this second sheet of paper it says, "percentages from Oil and Gas Board's letter to Brooks Hines of May 1, 1979"?

A Yes.

Q And that would be this letter from the State Oil and Gas Board to Brooks Hines dated May 1, 1979 which has already been marked as Exhibit Three?

A Yes.

Q And a copy of that letter, when it was originally sent, did not come to your office, did it?

A No.

Q So that letter was given to your office by Representative Brooks Hines and was then used in making the calculations in the revised fiscal note?

A Well, I'm not sure if it was given to us by Brooks Hines or the Oil and Gas Board. You would have to ask Mr. Vernon that.

Q And the second sheet of paper where the handwriting calculations appear indicates up at the top that all of the calculations are based on the assumption that the production affected by this Act would come from Escambia County only?

A Yes.

MR. CROWE: Page 46, Line 18, by Mr. Seale.

Q Rex, I just have one question. The fiscal note, the [1270] final fiscal note that was attached, there was no doubt that that note interpreted the Act only to apply to Excambia County?

A Yes. That's the fiscal note that the Senate would have had privy to.

Q That was the fiscal note attached to the bill at the time of passage and signing by the Governor?

A Apparently that fiscal note was on the Bill when the

Governor signed it, if my interpretation of this is correct. The stamp of the Department of Archives and History is on this fiscal note, so it appears that the last fiscal note that we prepared was before the Governor when he signed it.

MR. CROWE: Your Honor, we offer the deposition of Mr. McDowell into evidence.

THE COURT: All right.

(WHEREUPON, the deposition of Rex McDowell, marked for identification purposes as Plaintiff's Exhibit No. 24, was offered and received into evidence.)

THE COURT: We had better take a break at this time.

(WHEREUPON, after a brief recess, Court reconvened and the following occurred:)

[1271] MR. CROWE: Your Honor, we're going to offer at this time, Exhibit 35 and 36 being the Rules of the Alabama House of Representatives and the Rule of the Senate of the State of Alabama as referred to in the last deposition

THE COURT: All right.

(WHEREUPON, Rules of the House of Representatives of Alabama, 1979, marked for identification purposes as Plaintiff's Exhibit 35, was offered and received into evidence.)

(WHEREUPON, Rules of the Senate of the State of Alabama, 1979, marked for identification

purposes as Plaintiff's Exhibit 36, was offered and received into evidence.)

[Record page 1271]

LOUIS G. GREEN

The witness, called in behalf of the Plaintiffs, was duly sworn to speak the truth, the whole truth, and nothing but the truth, and testified as follows:

DIRECT EXAMINATION

BY MR. SCREWS:

Q Mr. Green, please state your name for the record.
A Louis G. Green.
Q What is your profession, please?
A I'm an attorney.
Q And what do you do for a living?
[1272] A I work for the State of Alabama as Director of the Legislative Reference Service.
Q And, Lew, how long have you been Director of the Legislative Reference Service?
A Since 1970.
Q What is the Legislative Reference Service?
A The Legislative Reference Service is an agency created the Legislature to act primarily in the field of research and drafting for the Legislature. It does much more than that but that's its prime function.
Q Are your offices in the State Capitol?
A Yes, they are.
Q And do you and your staff have floor privileges in both the Senate and the House of Representatives?
A Yes, we do.
Q How many attorneys do you have employed on your staff?
A On a continuing basis, eight to ten.

Q Now, were you subpoenaed earlier in this case with a subpoena duces tecum in addition to giving your deposition with all parties present?

A I did.

Q And during this deposition did you bring certain documents from your files pertaining to Representative Brooks Hines and Representative Hines' efforts toward getting legislation pertaining to oil and gas severance taxes?

A I did.

[1273] Q And do you have those files with you today?

A I do.

Q Approximately how long has your office worked with Senator Hines in aiding him in drafting legislation pertaining to oil and gas severance taxes?

A Oh, probably, since 1978.

Q Did your office aid or help Senator Hines in the drafting the original Bill, substitute Bills, amendments, and so forth, that led to House Bill 148 which was ultimately passed in substituted form by the Alabama Legislature?

A To the best of my knowledge, yes.

Q During your deposition, there were three, well, actually four drafts of Bills identified. The Exhibit 1 to your deposition was the final Bill together with Fiscal Notes that was enacted by the Legislature, and we already have that in evidence in a couple of forms. Exhibit 2, 3 and 4 to your deposition were three Bills all involved House Bill 148, and Exhibit 2 was identified as Sub 103; Exhibit 3 as Sub R-103, and Exhibit 4 as a Memorandum Note with Sub 104 attached to it. Is that correct?

A Yes, that's correct.

Q Then all three of these documents come from your files and are they kept there in the ordinary course of business?

A Yes, they are.

MR. SCREWS: We would like to introduce these three drafts pertaining to House Bill 148 as a a combined Plaintiff's Exhibit No. 27.

[1274] THE COURT: All right.

(WHEREUPON, a composite exhibit consisting of drafts pertaining to House Bill 148, marked for identification purposes as Plaintiff's Exhibit No. 27, was offered and received into evidence.)

Q Now, Mr. Green, looking at the first Bill on combined Exhibit 27 which is Exhibit 2 to the RS, meaning Reference Service deposition, on the second page, I will ask you whether or not in the phrase "all wells producing twenty-six barrels of oil per day shall be treated at the rate of four percentum of the gross value of said oil or gas at the point of production" and ask whether that draft has written in in red ink "all oil wells". Is that correct, sir?

A That's correct.

Q And then the second exhibit in combined Exhibit 27, called Sub R-103, has the word "oil" written or typed in the Bill rather than inlined with ink so that the first sentence on page 2 would read, "All oil wells producing less then twenty-six barrels of oil per day shall be taxed at the rate of four percent," and the next sentence, "All oil wells that come into production after the effective date of this Act shall be taxed at the rate of four percent," was that document found in your files?

A It was.

[1275] Q Then the third document entitled Sub 104 - - the first one was Sub 103 and 103-R - - 104, the same sentence does not include the word "oil". Is that correct?

A That's correct.

Q So then it reads, "All wells producing less than twenty-six barrels"?

A That is correct.

Q Now, in your opinion, is the third set the most recent set of the three drafts that we are talking about?

A Yes.

Q So that Sub 103 would be the first in chronological order, Sub 103-R or R-13, would be the second in chronological order, and Sub 104 would be the third in chronological order?

A Yes, that's correct.

Q And the third and last one does not contain the word "oil" in the sentence exempting all wells producing twenty-six barrels. Is that correct, sir?

A That's correct.

Q Now, in your file, also, was there not attached to the third of these sets of documents a typed memorandum dated May 3, 1979 to Representative Hines upon which this Sub 104 was attached?

A That's correct.

Q Could you read that memorandum to the Court?

A (Reading) Representative Brooks Hines. Enclosed is a substitute to House Bill H 148. He wants two substitutes to the Substitute to 148. 1. Make the increase [1276] of two percent phase out in 1983. 2. Limit the increase to those oil and gas wells from between 15,000 to 15,800 feet - - paren, question mark, end parenthesis - - in the Smackover Formation. Then also prepare him amendments, paren, two, end paren, amending the Substitute to H 148 doing the same thing.

Q And this is an interoffice memorandum conveying a message from Representative Hines to your draftsman. Is that correct?

A That is correct.

Q And just for the chronology, Mr. Green, I show you a

copy of the Bill as finally passed by both Houses. On the top of Page 2, the Bill is finally passed by both Houses, does not have the word "oil" inserted?

A That's correct.

Q It simply says, "All wells producing less than twenty-six barrels".

A That's correct.

MR. SCREWS: I believe we have offered the combined Exhibit 27.

Q Were all three of these documents in combined Exhibit 27 drafts of House Bill 148 that were prepared for and on behalf of and at the request of Representative Hines?

A That's correct.

MR. SCREWS: That's all.

MR. BRASWELL: No questions.

MR. SEALE: No questions, Your Honor,

[1277] CROSS-EXAMINATION

BY MR. BRECKENRIDGE:

Q Mr. Green, I show you Sub 103 of Plaintiff's Exhibit 27, page two; line six, and line nine, in which the word "oil" is written in in red ink. Do you see that?

A Yes.

Q Do you know who wrote that in there, Mr. Green?

A No, I do not.

Q Do you know when it was written in?

A No, I do not.

Q You have no idea when it was written in?

A No, I do not.

Q Would it be possible it could have been written in after the start of this suit?
A Well, I don't know when this suit started or - -
Q Well, let me ask you this.
A - - I'd say to the best of my judgment, it was not inserted after the suit had commenced.
Q Could it have been written in, say, after House Bill 148 had passed?
A Yes, it could have been.

MR. BRECKENRIDGE: Thank you.

A The whole thing could have been prepared afterwards, you know.

MR. BRECKENRIDGE: Thank you, Mr. Green.

[1278] REDIRECT EXAMINATION

BY MR. SCREWS:

Q If you go back and look at the document that came out of your file as Sub R-103, the word "oil" is typed in in typewriter in the draft, is it not, Mr. Green?
A That's correct.
Q And in your best judgment, Sub R-103 followed Sub 103?
A Yes, that's correct.
Q And did anyone from any of the oil companies, to your knowledge, have access to your files prior to the taking of your deposition?
A No, they did not.

MR. SCREWS: That's all.

MR. CROWE: We are going to offer at this time portions of the Brooks Hines deposition, pre-

viously marked in the preceding hearing as plaintiff's Exhibit 12 and it is now marked as Plaintiff's Exhibit 26.

MR. BRECKENRIDGE: Your Honor, the Defendant objects to the introduction of that.

THE COURT: Hines' testimony?

MR. BRECKENRIDGE: It is incompetent, irrelevant, and immaterial.

THE COURT: You're not objecting on any grounds except the admissibility?

MR. BRECKENRIDGE: Yes, sir.

THE COURT: Not that it's in deposition form?

MR. BRECKENRIDGE: That's correct, Your Honor.

[1279] THE COURT: He says it's admissible. Why do you say it's not? The same grounds - -

MR. BRECKENRIDGE: It's incompetent, Judge, to ask the Legislator what he intended to do when his actions speak - - the Act itself speaks for what he intended to do, and to ask him on deposition what are you trying to do when you introduced this Bill is inadmissible.

THE COURT: What do you have to say, Mr. Crowe?

MR. CROWE: We quoted a moment ago, Your Honor, from Sutherland on Statutory Construction, "In recognition of the reality of legislative practice, courts give consideration to statements made by a

Bill's sponsor on grounds similar to those relied on to support the use of statements made by the committeeman in charge of the Bill."

Mr. Brasewell, I believe, cited the case of T. R. Miller Mill Company to the Court when we had this same objection earlier.

THE COURT: The reason I am asking this, what was on his mind may not be, but what he did and what he said, and that's why I asked this.

MR. BRASWELL: Judge, I suggest that as we go on into the deposition and then if Mr. Breckenridge considers certain parts of it to be objectionable, we can then consider [1280] the objection in light of the specific answer.

THE COURT: And my previous ruling, too, so you will know.

MR. BRECKENRIDGE: May I have the same objection, Judge?

THE COURT: Yes, you have that, and then when we get to - - are you going to read this?

MR. CROWE: Yes, sir.

THE COURT: Then we will - - if there is something other than what was said or done, and just to his intent, you may want to - -

MR. BRECKENRIDGE: The only distinction I would preceive between this objection and the previous objection concerning Mr. Pemberton when he was on the stand if the Court remembers his testimony, and at that time I also had a hearsay objection,

Your Honor, where this time I'm just saying it's incompetent for him to offer anything into evidence.

THE COURT: All right. We will listen and see what he has to say.

MR. SCREWS: Judge, I do understand that the Court wants Mr. Breckenridge to specifically object - - -

THE COURT: Other than his general objection, and then if we come to something where we are [1281] talking about what was on Mr. Hines' mind, I think, perhaps, you would have grounds, but what was said or done to get the historical background, I'm permitting that to go in.

[Record page 1281]

DEPOSITION OF BROOKS HINES

MR. CROWE: Page 8, Line 11.

Q For the record, Mr. Hines, could you give us your full name and address?
A My name is Leon Brooks Hines. I live at 805 Evergreen Avenue, Brewton, Alabama.
Q What is your occupation?
A I am a realtor.
Q And what is your age?
A Thirty-Two.
Q And how long have you been engaged in the real estate business?
A I have been engaged in the real estate business eight years.
Q Are you also a Legislator in the Alabama Legislature?
A Yes.

Q And what county do you represent?
A Escambia.
Q And are you a member of the House of Representatives or the Senate?
A House of Representatives.
Q How long have you been a member of the House of Representatives representing Escambia County?
[1282] A Approximately five years.
Q Are you familiar with Act Number 434 that was passed in the 1979 session - - -
A Yes, sir.
Q - - of the Legislature? Were you the sponsor of that Bill?
A Yes, sir.
Q Going back before the 1979 session - - well, withdraw that. Act 434 dealt generally with an increase of severance taxes on production of oil and gas?
A Yes, sir.
Q And before the 1979 Legislature had you introduced other bills of the same or similar nature?
A Yes, sir, I had introduced a number of bills, all of which died in the Senate on the calendar, which were general increases in the severance tax from four to six percent.

MR. BRECKENRIDGE: Your Honor, could I have a statement from the plaintiff as to why he is introducing the deposition over presenting live testimony of Mr. Hines?

MR. CROWE: Well, mainly because Representative Hines resides over a hundred miles from this courthouse.

MR. BRECKENRIDGE: You do state that he does reside there?

MR. CROWE: Correct.

THE COURT: Well, that's what I meant awhile ago [1283] when I said, do you have any other grounds except the use of the deposition.

MR. BRECKENRIDGE: Oh, yes, sir.

THE COURT: That's why I asked. All right. Go ahead.

Q On a statewide basis?
A Yes, sir.
Q Now, what sessions of the Legislature, if you know, did you previously introduce these bills that did not pass to increase severances taxes?
A I don't remember the exact sessions because there were a lot of special sessions, whether they were regular sessions, but I believe I started in 1976.
Q So you have been at it for a while?
A A while.
Q Now, going back to Act 434, that Bill was passed by you in the '79 Session?
A Yes, sir.
Q Are you able to identify for us from the files which you have brought prusuant to the subpoeana anything that looks like what the original Bill was as introduced initially in that Session of the Legislature?
A I can't be certain which one was the initial Bill. I believe I could go back from the project notes that the Reference Service has got if I myself did it and find the original Bill, but - - -

MR. CROWE: Page 13, Line 1.

Q So, to the best of your recollection, Exhibit One is the [1284] initial Bill and Exhibit Two represents the first substitute?

A That's right.

MR. CROWE: And those have already been introduced in the Archives records and through Mr. Pemberton, Your Honor.

MR. SCREWS: Exhibit Two has not.

MR. HAMAR: No, Exhibit Two has not been, but Number One has been.

THE COURT: All right.

MR. CROWE: At this time we offer Exhibit 2 to the Hines deposition which is also Plaintiff's Exhibit No. 2.

MR. ARENDALL: What is the number in this case?

MR. CROWE: Two.

(WHEREUPON, Sub-15, Substitute For H. B. 148, marked for identification purposes as Plaintiff's Exhibit 2, was offered and received into evidence.)

Q Okay. Now, insofar as the tax increase under Exhibit One or Two, what kind of increase was that?

A That was an increase - - there are two severance taxes in Alabama. One is a two percent tax which I did not amend with this Bill that goes to the State Oil and Gas Board. This is an increase in the four percent tax to a six percent tax, half of the increase going to the producing counties based on their production and half of it going to the State General Fund.

[1285] Q Okay. And it was an increase percentagewise of how much?

A Two percent.

Q From four percent to six percent?

A That's right.

Q And specifically, according to the caption of Exhibits One and Two, it was an increase of - - or it was an amendment, rather, of Section 40-20-2, et seq, Code of Alabama?

A Yes, sir.

Q And this two percent increase, as initially introduced, was that on a statewide basis?

A Yes, sir.

Q Applying to all production?

A Applying to all production.

Q All right. After the initial version and the substitute making the change that you made reference to a moment ago was submitted, what happened next?

A What happened next was that the - - can I say the whole thing?

Q Let me withdraw and ask you this way. Was the Bill which I think was House Bill 148, was it referred to any particular committee in the House of Representatives?

A It was referred to the Ways and Means Committee.

Q And Mr. Walter Owens is the Chairman of that Committee?

A Yes, sir.

Q Mr. Sandusky is on that Committee?

A Yes, sir.

[1286] Q Did the initial version of the Bill, was it reported out favorably by the House Ways and Means Committee?

A The - - you mean the initial version of the Bill considered by the Committee?

A Yes.

A Yes, sir.
Q Introduced by you. Did it come out of the Committee the same way that you had initially introduced it?
A It didn't come out the same way I had initially introduced it. It came out the way the Committee initially considered it.
Q And what way was that?
A That was in the substitute form which had a depth amendment in it.
Q What kind of depth amendment, now? Can you tell us something generally about the depth amendment?
A Yes, sir. I can tell you that it applied to the Smackover Formation and production in that formation between 15,000 and 15,800 feet.
Q All right. Do you know the date that it came out with that depth proviso on it?
A No, sir.
Q That would be easily ascertainable from the records at the Capitol, though, would it not?
A Yes, sir.
Q So that the 15,000 to 15,800 foot depth proviso limited the application of the Bill - - -

MR. BRECKENRIDGE: Objection.

[1287] Q - - to production in that interim?

THE COURT: You objected?

MR. BRECKENRIDGE: Yes, sir.

THE COURT: Overrule your objection.

MR. CROWE: Page 16, line 12, I guess.

A Okay. I don't know what all this means. In my drawing up the Bill, I thought that the increase in the tax would

be limited to the production in the Smackover Formation between 15,000 and 15,800 feet, and that's what I told the Committee, to the best of my recollection.

Q Wherever encountered within the State of Alabama?

A Wherever encountered within the State of Alabama.

Q Did you have any general knowledge or understanding as to where that production at that depth existed?

A Yes, sir, and I specified to the Committee, that at present, production at that depth only applied to Escambia County, Alabama, according to the information given me by the State Oil and Gas Board. The question was asked of me, you know, could it occur at some future date, as I recall, and I said yes, theoretically it could refer to another county, but right now it only refers to my county.

MR. CROWE: Page 18, Line 11.

Q Did you make much the same or similar representations in respect to this Bill on the floor of the House?

A Yes, sir.

Q Did you attend on the floor of the Senate when the Bill reached the Senate?

[1288] A Yes, sir.

Q Did you make much the same or similar representations?

A I don't recall having said - - Mr. Crowe, it seems to me that someone else on that Committee was speaking on my behalf rather than me on that day, and I may have said the same thing. If I said anything it would have been of the same or similar nature.

MR. CROWE: Page 19, Line 21.

Q You have been quoted in several newspapers throughout the State, Mr. Hines, on making statements to the

effect that this Bill was only intended by you to affect production in Escambia County.

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule your objection.

Q Is that true and correct?
A Well, I don't know what I said -- I'm not sure I exactly put it like that, but it was my understanding that it would only effect production in Escambia County.
Q That's what you intended, was it not?
A That was my intention.
Q All right, sir. What specific monetary need was there in Escambia County that you were addressing by increasing this tax?
A I was addressing a short fall in the revenues in the County General Fund. I was addressing the need to set up some sort of industrial development authority to promote our county, which I provided that some of the funding from this Bill would go for. And then the third [1289] segment of that money was to address revenues for the municipalities in my county which have a problem because we are adjacent to Florida and they don't have a sales tax in Florida.

MR. CROWE: Page 21, Line 3.

Q Okay. Now, referring to Exhibit Number Three, the final version of the Act, I see in - - well, it's on page two, about sub-paragraph (d), the last sentence, a statement that, "Any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefor."
A Yes, sir.
Q That was a change in the law that you effected through the passage of Act 434?

A That's right.
Q Does that royalty exemption, was it intended by you to apply only to the increase?
A Yes, sir, that's what it says.
Q All right, sir. In Section (e) on the same page of Exhibit Three, there is a sentence which in effect prohibits the pass-through of the increase. Is that correct?
A Yes, sir.
Q Was that a change which was effected by you in drafting and pushing through the Legislature Act 434?
A Yes, sir.
Q Was it likewise intended by you to only apply to the increase?
[1290] A Yes, sir.
Q And up on page one, the last sentence in sub-paragraph (a) is a depth proviso providing, "Provided, however, that said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,000 [sic] feet in the Smackover Formation." Is that the depth proviso that you referred to in your earlier testimony?
A Yes, sir.
Q And was that proviso intended to limit this tax, the application of this increase, to production in the stated interval?
A Yes, sir.
Q Do you remember any background on how that royalty exemption - -
A Was put in?
Q - - got into the Act?
A Yes, sir. I can tell you exactly how it was put in. The royalty exemption was put in by me after the Bill had been covered in the newspapers, and as a result of objections from my constituency who were affected by this who felt that it was an unfair - - -
Q Royalty owners constituents?
A Yes, sir, that's right. They felt it was an unfair tax

on them - - on the small royalty owners. And so I made that change in the law.

Q Now, thereto fore, the royalty had been paying its own share fo four percent. Is that right?

A Yes, sir.

[1291] Q So, it was your intention that this royalty exemption only applied to the increase that you were proposing?

A Yes, sir.

Q And did you so state and make that representation also to the House Ways and Means Committee?

A The question never arose, but that was my intention. I'll say this, had I been asked that question, I would have responded that it only applied to the increase.

MR. CROWE: Page 25, Line 7.

Q Is it true, Mr. Hines, that on the date of the hearing in the House Ways and Means Committee - - let me withdraw that. Did you have to ask Mr. Owens for a couple of extensions on the public hearing on H. B. 148?

A I think I did.

Q Were you having difficulty in getting the votes to get H. B. 148 out of Committee?

A I had no idea whether I had the votes.

Q But you felt like you had a great deal of difficulty, didn't you?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule the objection.

A I didn't want to take a chance. It's not true to say that I didn't think I had the votes because I had passed the Bill through the House and the Senate F and T Committee four times. It is true to say that I was not willing to take a chance on losing the Bill.

Q Do you remember talking to me on the telephone back on the 28th of January?

[1292] A Yes, sir.

Q Do you remember saying to me something to the effect that "Quite frankly, I couldn't get it out, I was having trouble getting it out of Ways and Means in the House because they didn't want to fool with the severance tax"?

A I think that was my fear, but I don't say - - I absolutely never knew whether I had the votes or not.

Q Hadn't some of the Committee members expressed opposition?

A Not openly.

Q But privately?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule the objection.

A The Chairman expressed reservation.

Q Walter Owens?

A Yes, sir. But I don't - - after I made the decision to go with the depth amendment, I never tried to count heads.

Q Okay. In other words, is it fair to say that the depth amendment limiting the application of this only to the state intervals was done in - - I won't say concession, but in deference to getting the Bill out of the House Ways and Means Committee?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule your objection.

A Most changes made in all Bills are made in deference to getting a Bill passed.

Q And that would have been true with regard to H. B. 148?

A Yes, sir but also - - I mean, I thought I was beat the [1293] year before on a general Bill of a similar nature, and it passed on something like a thirteen to one vote, so I don't think it's fair to say that I could not have gotten it out.

Q But you were doubtful?

A I'm always doubtful unless I have counted heads.

Q In particular, you were doubtful after three or four years of trying this thing?

A In particular, I wanted to be careful.

MR. CROWE: Page 31, Line 4.

Q Did you discuss this Bill with the Speaker?

A Yes, sir, I think I did.

Q Did you represent to him that it was limited in application only to the depth stated?

A Yes, sir.

Q What was the occasion for your discussion of this legislation with the Speaker?

A The occasion was that I discuss all my legislation with the Speaker.

Q All right. And he was generally aware, then, that it would not effect production on a statewide basis?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule the objection.

A Yes, sir.

Q Now, during the course of the passage through the two Chambers of the Legislature, did you have any occasion to discuss this matter with anyone in the Fiscal Office?

A Yes, sir, I must have, because they prepared a Fiscal [1294] Note on it. I believe I talked to Mr. Vernon.

Q Did he inquire as to the amounts of production attributable to Escambia County, Alabama?

A No, sir.
Q Did he - - had he - -
A Now, he might have, but that's what he is supposed to do, not me.
Q Did you furnish, particularly, to Mr. Vernon a letter that you had received from the State Oil and Gas Board showing Escambia County production and also entire statewide production?
A I may have. I don't remember that.

MR. CORWE: Page 33, Line 2.

Q Do you know whether or not anyone from the Fiscal Office attended the Committee meeting of the House Ways and Means Committee?
A There is always someone from the Fiscal Office there.
Q Do you know whether anyone from the Reference Service attended the meeting of the House Ways and Means Committee meeting?
A No, sir.
Q No, you don't know, or no, no one did?
A It would have been unlikely that anyone would have been there, there would have been no reason for them to have been there. I mean, you are responsible for explaining whatever is on that sheet of paper and if they make a mistake, it's your problem.
Q Now, in passing instructions to the Reference Service, [1295] how did you do that, by telephone, by letter, by - -
A I don't know.
Q Do you frequently talk to Mrs. Hazel Cone?
A Yes, I do.
Q And do you tell her what you want in the way of a Bill?
A I talked to Mrs. Cone, I talked to the other lady up there, and I tell them what I want in the way of a Bill.

Q And then they write it down and give it to someone to do?

A That's right, a lawyer in the Reference Service.

Q And you don't know what she does to transmit your instructions on the drafting to the fellow that's actually going to do the reading and writing?

A No, sir. I try to proofread my Bills to be certain that what I intended is what they do. And it seemed to me that they accomplished what I intended them to do in the Bill that they gave me back.

Q It was clear to you, then, that it only applied to increased production in the interval between fifteen and fifteen eight?

A That's the way I read it.

Q And that's what you intended?

A That's what I intended.

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule the objection.

MR. CROWE: Page 41, Line 8.

A Again, referring to Paragraph (a) of Exhibit No. 3, Act 434, Mr. Hines, the proviso dealing with the 15,000 foot production was intended by you when it uses [1296] the word "increase" to refer to the six percent or the increase from four to six percent up further in that same Paragraph (a)?

A Yes, sir.

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule the objection.

Q And not to the new well exemption - -

THE COURT: Wait, now. First, are you reading, starting with the question there, line 8, on page 41?

MR. CROWE: Yes, sir.

THE COURT: Would you mind reading it again?

Q Again, referring to Paragraph (a) of Exhibit Three, Act 434, Mr. Hines, the proviso dealing with the 15,000 foot production was intended by you when it uses the word "increase" to refer to the six percent or the increase from four to six percent up further in that same Paragraph (a)?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule your objection.

A Yes, sir.
Q And not to the new well exemption that you and Paul Owens discussed?
A No, sir.
MR. CROWE: Page 41, Line 21, by Mr. Braswell.

Q Mr. Hines, you had talked to the Governor, generally, about severance tax legislation earlier in this legislative session?
[1297] A Yes, sir.
Q Of '79? But then, is that correct, sir?
A Yes, sir.
Q And then at some later time you talked to the Governor's office and learned that there was a general revenue

package being supported by the Governor which did not include a severance tax?

A That they were coming with a general tax package in the following legislative year.

Q And because the administration had this general tax package, the administration - - the Governor's office did not want the severance tax of a statewide application?

MR. BRECKENRIDGE: Objection.

THE COURT: What's your - - I overrule the objection. Go ahead.

A They did not say that. They didn't say they didn't want it. They said that they did not have the time to push it in that legislative year.

Q So, when that development occurred, you changed your efforts so that you no longer sought a general statewide increase in severance tax, but sought one only for Escambia County?

A I don't know if I did it at that point or some weeks or time later, but yeah, that's correct.

Q And you decided to have the Act or the Bill worded in such a way that it would apply only to Escambia County and not to statewide oil and gas production?

MR. BRECKENRIDGE: Objection.

[1298] THE COURT: Overrule your objection.

A At the present. At the time it was passed.

Q And you got information from someone as to the depths at which oil and gas production occurred in Escambia County?

A Yes, sir.

Q From whom did you get that information?

A As I recall, from the State Oil and Gas Board. I think

the person to whom I talked with was Richard Raymond, the State Geologist.

Q And did you ask him to tell you the depths at which there was oil and gas production in Excambia County?

A Yes, sir.

Q And what did he tell you?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule the objection.

A He sent me a schedule and then as I recall, we talked about it after I got it.

Q Was the schedule something specifically prepared for you, or was it - -

A I don't think so. I think it was something they had on hand.

Q Do you recall whether it was a one page schedule or a booklet?

A It was either a one or two, something like that; it wasn't a booklet.

Q Did it list information concerning other counties as [1299] well as Eacambia County?

A It listed all the production of oil and gas in the State.

Q Field by field?

Q Field by field

A Yes, sir.

Q And it would state the depth from which that production occurred?

A Yes, sir.

Q The formation?

A Yes, sir.

Q The geological formation from which it occurred?

A Yes, sir.

Q And the name of the first well and the other pertinent information?

A Didn't give the name of the first well. It gave the name of the formation and the depth.

Q Is it correct that you then used that information to arrive at a depth range of 15,000 to 15,800 feet?

A Yes, sir.

Q As being the range where there was production of oil and gas in Escambia County?

A Yes, sir.

Q And it is correct - - -

A Now, there was other production in Escambia County but it's below twenty-five barrels a day.

Q We're going to get to that in a minute. Is it correct that you used that information from the State Oil and Gas Board as to oil fields, depth and formations - - -

A (Witness nods head in the affirmative.)

Q - - and determined from that information that the words [1300] "Smackover Formation" were words that you wanted to use in your Bill?

A That's correct.

Q And is it correct that you decided that you wanted two things to be mentioned in the special language of your Bill, namely, Smackover Formation, and a depth of 15,000 to 15,800 feet?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule your objection.

A Yes, sir.

Q And you wanted these two things to be mentioned for the purpose of narrowing the scope of this legislation to the production that you noticed from this information as being in Escambia County?

A Yes, sir.

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule your objection.

Q All right. When the House Ways and Means Committee considered the Bill for the first time, is it correct that the Bill then had in it the depth proviso limiting - -

A Yes, sir.

Q - - the application of the Bill to the Smackover Formation and the depth of 15,000 to 15,800 feet?

A Yes, sir, because I asked them to substitute the substitute before they ever considered the Bill they had in hand. And then I told them all the changes I made in it.

[1301] Q Did you ask that there be a substitution of a new bill for your original Bill?

A Yes, sir.

Q A substitution whereby the old statewide Bill was replaced with a Bill pertaining to the Smackover Formation and 15,000 to 15,800 feet?

A No, sir, it was still a statewide Bill.

Q Well, let's not get bogged down in concepts.

A Okay. That's an important concept.

Q Okay. Let's speak of the production. In other words, the first Bill was designed to apply to all production throughout the State?

A Yes, sir.

Q The second Bill was designed to apply to production only from the Smackover Formation at a depth of 15,000 to 15,800 feet?

A Yes, sir, wherever that might occur.

Q All right. And is it correct - -

A But that's not completely correct because the amended version that I introduced still refers in the first four percent to all state production. What you said only has to do with the two percent increase.

Q Yes, I'm speaking of the increase. Now, it's correct, isn't it, that when you arrived at the numbers 15,000 to 15,800 feet, your purpose was to prevent this Bill from applying to any other county than Escambia?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule your objection.

[1302] A Yes, sir.

Q You didn't want it to apply to Washington or Choctaw or Clark or any other county except Escambia?

A No, sir.

Q The way I phrased it is correct, isn't it?

A Yes, sir. It was not my intention that it would apply. I told the Ways and Means Committee as well as I honestly knew and I as I had been told by the Oil and Gas Board how it would apply, but I never held myself out to be a lawyer or to be able to, you know, say beyond what I had been told it would do by the folk that wrote the Bill.

Q Is it correct that when your substitute Bill was first considered by the House Ways and Means Committee, you as the sponsor of the Bill and as the person who had revised both the - - I mean drafted both the initial Bill and drafted the substitute Bill, told the House Ways and Means Committee that you viewed this Bill as applying only to production from Escambia County?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule your objection.

A At the present.

Q All right. And I notice you are using the words, at the present?

A Yes, sir.

Q You understand that there is an advertising requirement for local legislation, don't you?

A Yes, sir.

[1303] Q And that if something is a local Bill, it will be good and constitutional only if there has been a posting or an advertising as required by the Constitution?

MR. BRECKENRIDGE: Objection.

THE COURT: Well, that's a legal question, but I am going to let it go in, knowing that it is. He really just said what the law is.

A Yes, sir.

Q And you also understand that a way to skin the cat and have something which applies locally and which is not advertised is to call it general, but define the scope of its application in a narrow fashion?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule your objection.

Q That's something well known to Legislators, isn't it?

A No, sir, that's not the same thing at all as what I did.

Q All right. You have used the words, at the present time?

A Yes, sir.

Q Now - - -

A See, there is a difference, though. You are talking about a general Bill with local application, which had to do with population brackets, and the difference is that those Bills were always tied to a census; that is to say that they were general, of local application forever and ever. My Bill does not have such provision in it. If at such future time there was a well with a Smackover provision between 15,000 and 15,800 feet in Washington, Mobile, Dallas, wherever, the Bill would [1304] apply and I told them that.

Q And you viewed that as being a saving feature of your Bill?

A I viewed that as being the way I chose to pass the Bill.

Q So that it would not have to require advertisement or publication as a local Bill?

A No, sir, I didn't consider it a local Bill.

Q Let me be sure I understand you. Are you telling us that you really did want this Bill to apply to other counties?

A No, sir.

Q All right. You really wanted it to apply just to Escambia County, didn't you?

A I really inteded for it to apply just to Escambia County, but I also knew [sic] and told the Committee I was writing a general Bill.

MR. CROWE: Page 58, Line 3.

Q Speaking of the words Smackover Formation, in using them, was it your intention to exclude any oil and gas production in Escambia County?

A No, sir.

Q Were you aware whether there were other geological formations in Escambia County than the Smackover Formation?

A I was aware that there was one producing oil and gas, but all of the production in that formation was from old wells that produced less than twenty-five barrels a day.

[1305] Q What geological formation was that?

A I don't recall. It was a Pollard Field.

MR. CROWE: Page 60, Line 2.

Q So you had the Pollard Field in mind as something you wanted excluded from the coverage of your Bill?

A Just thought it would be.

Q Now, did you have in mind any other fields in Escambia County as being excluded from the coverage of your Bill?

A No, sir, I would say that if I did that I made a mistake.

MR. CROWE: Page 65, Line 8, by Mr. Black.

Q Did you discuss with Mr. Eagerton your purpose and intention in introducing that Bill?

A Yes, sir, I did.

Q And did you have a conversation with him wherein you told him you intended it to apply to Escambia County?

A Yes, sir, I did.

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule the objection.

Q When did that conversation take place?

A It took place - - well, let's see. I don't know. I was in the hospital, first of the Fall. I don't exactly remember when.

Q What month? Do you remember?

A Probably in September.

Q All right. Did you discuss it with other representatives of the Revenue Department other than Mr. Eagerton?

A No, sir - - yes, I did, I'm sorry. In fact - - how I - - [1306] well, Mr. Eagerton told me on the phone that - - I asked him how they came up with that interpretation of the law - - -

Q Statewide?

A Yes, sir.

Q All right.

A And I told him - - he said, well, that's what our Legal Department says. And I said, well, let me talk to someone over there. We went back and forth a bit about, you know, the interpretation of the law. And so he said that I should, you know, talk to so and so. So, he referred me to one of the lawyers in the Legal Section and I talked to him briefly, but he just basically told me how they ruled and I think I must have gotten the letter after that conversation, the letter you or someone here showed me that he had written me. I believe Mr. Crowe showed it to me.

MR. CROWE: Page 69, Line 6, by Mr. Seale.

Q Mr. Hines, referring you again to Section (e) of the Bill, and I believe that's Exhibit Three - - - and Mr. Wagnon says it's Section 1 (e) - - - excuse me, 1 (e) of Exhibit Three, you have previously testified that it was your intention that this exemption with respect to the pass-through would apply only to the increase?

A Yes, sir.

Q To the two percent increase, the exemption with regard to the pass-through - - -

[1307] A Uh-huh.

Q - - would apply only to the two percent increase?

A Right.

MR. CROWE: Page 80, Line 16.

Q I hand you a piece of paper marked Hines Exhibit 6. It is a copy of Senate Bill 202 from the current Legislature. Do you recognize that?

A Yes, sir.

Q Have you - - has that been discussed with you by the Senator that introduced it?

A Yes, sir, it has.

Q Have you expressed what your position to him or others what your position is as to supporting or opposing that legislation?

A Yes, sir, I have.

Q Would you state the substance of what your position is on it?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule the objection.

A I'll be glad to. I told him I would take the Act as I passed it, try to reconstruct it in a way that would

unambiguously apply only to Escambia County if that were possible. And that I would take those sections of the Bill, you know, make whatever changes that were unclear in the Bill, make them clear, either take them out or use clear language. And that would give everyone, the lawyers a chance to look over the Bill. That's what I said, because I have very little sympathy for the [1308] unclarity of this Bill because it wasn't passed in five days and a zillion lawyers from the other side did everything but ate it, and I'm not a lawyer. And I'm not responsible if my intention does not get in the Bill if I have given my opposition every opportunity to express their displeasure with any portion of it, which I did. I mean, there were no veil punches in the thing.

MR. CROWE: Page 85, Line 23, by Mr. Leonard.

Q Well, let me see if I can rephrase it, then. Did you intend that this Act or Bill would levy a severance tax that would apply to the whole State?

MR. CROWE: Then there are some objections and Mr. Breckenridge said, you can answer the question.

Q Yeah, answer it to the best of your ability.
A I intended to pass a general Bill whose affect - - or the affect of which at the time it was passed would only be to levy an increase in the County of Escambia. That's what I intended to do. Now, I'm not going to sit here and tell something that's not true, but I did in fact see that as a general Bill, I was not concerned except to be truthful with the Ways and Means Committee, about that portion of it. Now, I put in a repealer - - I mean, a severability clause in that Bill precisely to keep it from being sued because I had tried to pass a statewide Bill three times. If they took the royalty interest out, if they

took the consumer thing out and if they took the depth amendment out then they had sued [1309] themselves - - that is to say the oil interest who opposes this Bill - - into a statewide Bill, period. And it was clearly intended that part of it to stop the Bill from being sued. I had no objection to a statewide Bill but, in fact, I told the Ways and Means Committee that I intended the increase to apply to the production in Escambia County.

MR. CROWE: That's all from us. We would offer this at this point as Exhibit No. 2 to the deposition of Brooks Hines as Plaintiff's Exhibit No. 26.

MR. BRECKENRIDGE: Your Honor, I would now restate my previous objection as to the admissibility of that.

THE COURT: Overrule the objection.

(WHEREUPON, Deposition of Brooks Hines, marked for identification purposes as Plaintiff's Exhibit No. 26, was offered and received into evidence.)

MR. BRECKENRIDGE: You say you overrule my objection, Your Honor?

THE COURT: Yes, sir.

MR. CROWE: Your Honor, we want to mark this - - -

MR. SCREWS: The original has been filed - - -

MR. CROWE: The original has been filed, and we have a Stipulation which was signed by all Counsel which I would like to read to the Court.

[1310] THE COURT: All right, sir.

STIPULATION

MR. CROWE: (Reading) Comes now all of the plaintiffs and the defendant Eagerton in the above styled consolidated proceedings by and through their attorneys of record and stipulate and agree as follows:

The plaintiffs intend to call Walter Owens, J. Thomas Sandusky, Robert H. Jackson, Dick B. Mason, III, and James J. Sledge as witnesses on plaintiffs' behalf in the above consolidated cases. The affidavits of each attached as Exhibits "A" through "E" are summaries of their respective testimony which plaintiffs would expect to prove by each witness should the Court allow such testimony or any portion thereof as evidence in the trial over the objections of defendant.

It is further stipulated that the defendant intends to interpose timely objections to each and every portion of the testimony of each said witness and will assign all pertinent and material grounds of objection, which include, but are not limited to, relevance, materiality, competence, hearsay, and legality. Such objections of defendant will include, but are not limited to, objections which raise the points that such testimony is inadmissible because (1) the Act in question is not ambiguous on its face; (2) that the legislative intent cannot be shown by such testimony; and (3) that the intent of the Legislature can only be proved by the language used in the statute itself.

In order to save time and to expedite the trial of [1311] this case, the parties further agree and

stipulate that in lieu of calling such witnesses to testify at trial, the attached affidavits may be offered in lieu of trial testimony and that any portion thereof may be considered as evidence by the Court if such portion, if any, would be otherwise admissible over timely and pertinent objections of defendant, as set forth above.

MR. BRECKENRIDGE: Your Honor, at this time, I would like to interpose an objection to introducing the stipulation.

THE COURT: Overrule the objection.

[Record page 1311]

AFFIDAVIT OF WALTER OWENS

MR. CROWE: (Reading) State of Alabama, County of Bibb.

Personally appeared before me the undersigned Notary Public in and for said State and County, Walter Owens, who being by me first duly sworn deposes and says:

I am Walter Owens, Chairman of the Alabama House of Representatives Ways and Means Committee representing Bibb County and portions of Tuscaloosa County. I vividly recall House Bill 148 which was ultimately enacted as Act No. 434 in the 1979 Session of the Alabama Legislature. The Bill was initially introduced by its sponsor, Representative Brooks Hines of Escambia County, as a Bill to effect an additional increase in severance taxes by an additional two percent, from four percent [1312] to six percent, on all oil and gas pro-

duced in the State. This Bill was referred to my Committee by the Speaker of the House. A public hearing was requested on the Bill on June 6, 1979, but Representative Hines had requested the Committee to delay the hearing on two occasions so that he could change the Bill to a local Bill affecting production of oil and gas only to wells producing in the Smackover Formation between the depths of 15,000 and 15,800 feet. On June 6, 1979 Representative Hines attended the hearing and appeared before the Ways and Means Committee. At that time he represented to the Committee that his substitute Bill, which ultimately became Act No. 434, had been changed completely and contained a depth proviso limiting the application of the Bill only to wells producing oil and gas at depths between 15,000 and 15,800 feet. He said at the present time Escambia County was the only County in the State which had produced at this depth and in this stratum and, therefore, that the Bill would only affect Escambia County. Representative Hines then asked for local courtesy. This means that other members will automatically vote favorably for the measure, since it does not affect their county.

Based on the representations, H.B. 148 was reported out of Committee and was taken up by the House of Representatives on July 12, 1979. During floor debate, Representative Hines again represented that the intent of the legislation was to affect only wells producing [1313] gas in the stratum producing at 15,000 to 15,800 feet. In fact, the Bill was taken up by the House out of order assigned to it on the calendar because it was treated as a local Bill. There is no question but that the legislative intent was to limit the additional two

percent increase of severance taxes on oil and gas produced from wells with a depth of between 15,000 and 15,800 feet.

Hearings were postponed on two different occasions to allow Representative Hines time enough to try and reach an agreement that would be acceptable to those who were opposed to an additional increase in statewide severance taxes. There would have been no possibility of reporting the Bill out of Committee if the Bill was intended as a statewide Bill and the only reason the Committee voted the Bill out of Committee was because it was being changed by virtue of the depth proviso mentioned above to make it a Bill of limited application affecting only one county with production at those depths.

MR. CROWE: The second affidavit.

[Record page 1313]

AFFIDAVIT OF J. THOMAS SANDUSKY

MR. CROWE: (Reading) State of Alabama, County of Mobile.

Personally appeared before me the undersigned J. Thomas Sandusky, who being by me first duly sworn, deposes and says as follows:

[1314] I am J. Thomas Sandusky, one of the Representatives from Mobile in the Alabama House of Representatives. I am a member of the House Ways and Means Committee which considered H.B. 148 during the 1979 Session of the Alabama Legislature. H.B. 148 was ultimately passed by the Legis-

lature as Act No. 434 dealing with an increase in severance taxes on oil and gas production. On June 6, 1979, a public hearing was schedule before the Ways and Means Committee for consideration of H.B. 148 which was sponsored and proposed by Representative Brooks Hines of Brewton, Alabama. This Bill eventually passed the Legislature as Act No. 434.

I am familiar with Act No. 434 passed by the Legislature and know that it was the intent of the Legislature to levy an additional two percent tax on oil and gas production which is produced by a depth of 15,000 to 15,800 feet which affects only Escambia County, Alabama.

The initial version of H.B. 148 was a proposal to increase severance taxes by an additional two percent, for a total of six percent, on a statewide basis, applicable to all production within the State of Alabama. There was no way that H.B. 148 would have passed the House Ways and Means Committee as a Bill of statewide application, because the members of the Committee would have not voted to report the Bill out. Representative Hines was also aware of the fact that the Bill could not pass the Committee. I know this because I personally [1315] told Representative Hines that it could not pass and that I was voting against the Bill because I felt that it would retard exploration for oil and gas within the State and, therefore, was not in the best interests of the State. Representative Hines was well aware of the fact that a statewide Bill imposing an additional increase of two percent on oil and gas production could not pass the Committee because he had tried unsuccessfully in the three preceding sessions of the Legislature

to get the Bill passed. Accordingly, on the afternoon of June 6, when H.B. 148 was up for consideration, Representative Hines appeared before the Ways and Means Committee and stated that he was amending the initial version of H.B. 148 so as to make it applicable only to oil and gas production in the subsurface interval between 15,000 and 15,800 feet in the Smackover Formation. He stated that the only production in the State at these depths was located in his own county, Escambia County, and that he was, therefore, asking for local courtesy, for the Committee to vote favorably on the Bill and report it out. He apologized to the Committee for having only one copy of the Bill.

I specifically asked Mr. Hines during the Committee Hearing whether the Bill was a Bill applied only to Escambia County, and he replied without question that it only applied to Escambia County under present circumstances. Because of this representation, and only because of this representation, the Committee voted [1316] favorably upon the Bill and reported it out.

Representative Hines made the same representations concerning the local nature of the Bill in discussions on the floor of the House of Representatives when the Bill was passed and again local courtesy was extended.

The meaning of "local courtesy" in the Alabama Legislature is that members accord local delegations the courtesy of passing or voting favorably upon a measure which affects the sponsoring member's particular district or county.

I voted in favor of Representatives Hines' amended H.B. 148 only because it was intended to be a measure which affected oil and gas production in Escambia County and not in Mobile County or the rest of the State. There can be no question but that Representative Hines represented the Bill as a Bill affecting only production in the interval between 15,000 and 15,800 feet and that the Committee voted favorably upon the measure because of its limited scope of application. It was the intent of the Legislature as well as the House Ways and Means Committee that no Bill increasing severance taxes on a statewide basis should be passed.

MR. SCREWS: The third affidavit is one of Robert H. Jackson who is being sworn says as follows:

[Record page 1316]

AFFIDAVIT OF ROBERT H. JACKSON

MR. SCREWS: (Reading) I am Robert H. Jackson, Vice President of Jacksoco, Inc., an independent producer of oil and gas with principal offices in [1317] Mobile, Alabama.

I was present at the hearing of the Ways and Means Committee of the House of Representatives for the State of Alabama in the Capitol at Montgomery on June 6, 1979, when H. B. 148 which eventually was enacted as Act No. 434 of the 1979 Session of the Alabama Legislature, was heard before the House Ways and Means Committee. On the afternoon of June 6, just before the Committee hearing, I met outside the Ways and Means Committee Hearing Room with Mr. Brooks Hines, Representative from Escambia County, Alabama, who was the sponsoring legislator of Act 434. Present at

this time in the hall were Mr. Dick Mason of Jackson, Mississippi, Mr. Richard Lee of New Orleans, Mr. Jim Sledge of Tuscaloosa, Alabama, Mr. Johnny Johnson of Montgomery, Alabama, and Mr. Charlie Williams of Jackson, Mississippi, together with several other persons.

Things were rather rushed at this time, since the House Ways and Means Committee was holding a hearing on the four percent gasoline tax being advocated by the Governor and there were a great many people around for this hearing. Mr. Hines came to our group and told us that he was amending H.B. 148 so as to make it a local Bill applying to oil and gas production between the interval of 15,000 and 15,800 feet. He said that at the present time the only production in the State at this depth and in this interval was in Escambia County and, therefore, the production from other depths outside of [1318] Escambia County would not be affected and was not intended to be taxed at the additional two percent increase levied by Act No. 434.

At this time Mr. Hines was rushing around trying to get the amended Bill typed up and he gave it to a secretary who typed it up in a nearby room. When the Committee hearing commenced, Mr. Hines had only one copy or, two at the most. He apologized to the House Ways and Means Committee for having only one or two copies and told them that he had amended the Bill so as to make it applicable only to production between the depths of 15,000 and 15,800 feet which would apply only to Escambia County, Alabama, and would exempt any new wells drilled for a ten year period. Also, wells producing 26 barrels of oil per

day from said depths would be exempt from said proposed local tax. One member of the Committee later specifically asked Mr. Hines if this was a local Bill, and Mr. Hines represented that indeed it was local, affecting only Escambia County. After this, the Committee then voted the Bill out of Committee as a local Bill for consideration by the House of Representatives. Mr. Hines also told us after the hearing that he would oppose any amendment which might be made on the floor of the House of Representatives to make the Bill statewide, since it was his intention to have the Bill apply locally only to Escambia County, Alabama. From Mr. Hines' statement as sponsor of the Bill and from the questions [1319] from the Committee concerning its local nature, there is no question in my mind but that the Committee intended to vote favorably on a local Bill having application only to production derived from the interval between 15,000 and 15,800 feet.

MR. SCREWS: The next affidavit is one of Dick B. Mason, III, who has been first duly sworn under oath, deposes and says:

[Record page 1319]

AFFIDAVIT OF DICK B. MASON, III

MR. SCREWS: (Reading) I am Dick B. Mason, III, Area Manager for Hughes and Hughes, a partnership, engaged in the exploration for oil and gas in Alabama and elsewhere. We have oil and gas production in the State of Alabama, and I attended a hearing before the Ways and Means Committee of the House of Representatives of the Alabama Legislature at the Capitol in Montgomery, Alabama on

June 6, 1979. This hearing was called in connection with House Bill No. 148 which eventually was enacted by the Alabama Legislature as Act No. 434 in the 1979 session.

House Bill No. 148 was a Bill to increase Alabama Severance Taxes by an additional two percent, from four percent to six percent, on all production in every county in the State. The Bill was sponsored by Representative Brooks Hines of Escambia County, Alabama.

I had come to Montgomery to give testimony in connection with this Bill to the House Ways and Means [1320] Committee. Just prior to the convening of the Committee at about 2:00 P.M. on June 6, 1979, Representative Hines approached me and several other witnesses who were prepared to give testimony on the Bill. He approached us in the hall in the Capitol outside of the Committee Hearing Room. There were six or seven other people in the group including Robert Jackson of Mobile, Richard Lee of New Orleans, Jim Sledge of Tuscaloosa and others.

Representative Hines stated to us that since the Bill as written could not pass the Committee and be reported out, he was preparing a "substitute bill" so as to restrict the Bill's scope of operation only to wells producing gas in the interval between 15,000 feet and 15,800 feet in the Smackover Formation. He stated to us that at the present time the only wells in the State producing at this depth from this formation were located in Escambia County, Alabama, and, thus, at the present time, the Bill would only affect Escambia County production. At or about this same time he called a

secretary and gave to her the depth "proviso" designed to so restrict the application of the Bill to production obtained in the 15,000 - 15,800 foot interval. The girl took the paper to a typewriter in the Capitol and typed up the proviso just prior to the convening of the House Ways and Means Committee.

When the Committee convened and House Bill No. 148 was called on the Committee's agenda, Representative Hines stated to the Committee, whose Chairman was [1321] Representative Dick Owens, that he was changing his Bill so as to restrict its operation only to wells producing at the depth of 15,000 - 15,800 feet in the Smackover geological formation. He stated that at the present time the only wells in the State producing at this depth from this formation were located in Escambia County, and thus that the Bill would not apply to any other production in the State, at least under present circumstances. He then read the depth proviso to the Committee and asked the Committee for "local courtesy", stating that he would extend local courtesy to the members of the Committee and expected them to extend local courtesy to him.

After explaining the local nature of his Bill and requesting local courtesy, the Committee voted unanimously to pass the substitute Bill containing the depth proviso based on representations made by Representative Hines. The depth proviso which Representative Hines had typed on June 6, 1979 and which he said was designed and intended to restrict the Bill's operation now appears as the last sentence of the first paragraph, Paragraph (a), of Act No. 434.

The statements and representations of Representative Hines were taken by the Committee in good faith and local courtesy was extended to Representative Hines as a result of these representations.

At no time did Representative Hines mention to me or to the House Ways and Means Committee that the [1322] substitute Bill also added amendments dealing with exemption of royalty interests from the two percent increase or changes prohibiting producers from passing through the two percent additional increase to consumers as now appears in House Bill No. 434.

Signed, Dick B. Mason.

MR. SCREWS: And then the last affidavit is of Mr. James J. Sledge, who was sworn and deposed, and says as follows:

[Record page 1322]

AFFIDAVIT OF JAMES J. SLEDGE

MR. SCREWS: (Reading) I am James J. Sledge, General Counsel for Warrior Drilling and Engineering Company, Inc., an Alabama corporation engaged in the exploration for oil and gas in Alabama. Warrior has an interest in a number of producing oil and gas wells in Alabama, some of which are operated by Warrior and some of which are operated by others. On June 6, 1979, I attended a hearing before the Ways and Means Committee of the Alabama House, the meeting being held at the Capitol Building in Montgomery, Alabama. One of the items considered at the meeting was House Bill 148, which was eventually

enacted by the Alabama Legislature as Act Number 434 of the 1979 Regular Session.

The Bill's sponsor was Representive Brooks Hines of Escambia County, Alabama. Before the Ways and Means Committee considered the Bill, Representative Hines conferred with myself and several persons who were prepared to testify as witnesses concerning the Bill. Near [1323] the conclusion of the conference, Representative Hines stated that he was preparing a substitute Bill that would restrict the tax increase imposed by the Bill to wells producing oil and gas in the interval between 15,000 feet and 15,800 feet in the Smackover Formation, stating to us that the only wells producing from this interval at this time were located in Escambia County and that the Bill would therefore affect only Escambia County and be a "Local Bill".

When House Bill 148 was called on the Ways and Means Committee's agenda, Representative Hines addressed the Committee and its Chairman, Walter Owens, presenting the Bill to the Committee on the basis that it had been substituted so as to restrict its operation to wells producing from the interval between 15,000 feet and 15,800 feet in the Smackover Formation. He stated that at the present time only wells located in Escambia County would be affected by the tax increase under the Bill and asked for "local courtesy" from the Committee, further stating that the Bill would not affect other production in the State. There was no discussion by Representative Hines or the members of the Committee dealing with the changes that the Bill made concerning the exemption of royalty interest or prohibiting producers from passing through the two percent increase to consumers, all of which now appear in House Bill 434.

THE COURT: Now, this original, I am going to get her to - - you all stipulated it. Do you want [1324] this marked as an Exhibit at this time?

MR.CROWE: Yes, sir, let's do that. Mark it as Exhibit 10, and we offer that.

(WHEREUPON, the Stipulation of Counsel and Affidavits attached, marked as Plaintiff's Exhibit No. 10, were offered and received into evidence.)

THE COURT: We will recess now for lunch, and return at 1:45.

(WHEREUPON, Court recessed for lunch at 12:20 P.M. and reconvened at 1:45 P.M. and following occurred:)

MR. CROWE: We call Mr. Victor Vernon.

[Record page 1324]

VICTOR VERNON

The witness, called on behalf of the Plaintiffs, was duly sworn to speak the truth, the whole truth, and nothing but the truth, and testified as follows:

DIRECT EXAMINATION

BY MR. CROWE:

Q State your full name and address, Mr. Vernon, please.
A Victor Herbert Vernon, 3616 Kelley Lane, Montgomery
Q By whom are you employed?
A By the State of Alabama, Legislative Fiscal Office.
Q What is your title or job description with the Fiscal Office?

A I'm a Fiscal Analyst.

[1325] Q What is your educational background?

A Bachelor's Degree in Economics, UAB, Master's Degree in Finance from University of Alabama.

Q You're familiar with Act 434 of the 1979 Session of the Alabama Legislature?

A Yes, sir.

Q Were you the Analyst that analyzed that Act?

A Yes, sir.

Q Did you project the estimated revenue to be derived from that Act?

A I did.

Q Have you brought your files with you today?

A Yes, I have them.

Q I ask you to look at your file, Mr. Vernon, and see if you have in there a memorandum from yourself to Mr. McDowell, dated August 30, 1979?

A Well, from memory. My files are back there.

Q Would you mind getting them and bring them up there, please?

A All right. I have the memorandum.

Q Was the memo - - do you have a memo dated August 30th to Mr. McDowell?

A I do.

Q Would you read that memorandum to the Court, please?

A (Reading) Memorandum, To Rex, From Victor, Regarding Fiscal Notes to House Bill 148.

The fiscal note to House Bill 148 as introduced carried an estimate of $5.4 Million in additional tax revenue, as the Bill affected all in-state wells producing more than twenty-six barrels of oil per day.

This estimate remained in the fiscal note of House Bill 148 from June 6, 1979 until July 17, 1979, after being reported out of the Senate Finance And Taxation Committee. The estimate was changed to reflect an interpretation of House Bill 148 as substituted affecting only Escambia County's production of oil and gas.

The note was then changed upon contacting officers of the Department of Revenue who had accepted the Escambia County interpretation as the intent of the Bill.

MR. CROWE: Could we have that marked?

MR. SCREWS: We already have it as Exhibit 7.

MR. CROWE: Oh, it's already marked as Exhibit 7? Let the record reflect that the memorandum which the witness has just read into the record has been previously marked as Exhibit No. 7 for the Plaintiffs.

Q Did you then prepare two separate fiscal notes for this particular bit of legislation?
A Yes, sir, two fiscal notes were, in essence, prepared by me.
Q And the first note was one estimating 5.4 Million Dollars in revenue?
A Correct.
Q And that estimate was made by you on a statewide basis [1327] of all production?
A Yes, sir.
Q And the second fiscal note was one estimating revenue at 1.7 Million Dollars?
A That's right.
Q What was the basis upon which you calculated the fiscal note number two?
A I calculated it on the estimated amount of production on oil and gas that was attributed to Escambia County.
Q Does your file contain any notations or computations showing how you arrived at those two figures?
A Yes, sir. It's some impact analysis worksheets that we attach to all the Bills before we even develop the fiscal notes.
Q May I see those notes, please, sir?
A Yes, sir.

Q You have handed me a Fiscal Note dated 7/17/79 with a yellow sheet attached showing various calculations, and a Fiscal Impact Analysis Worksheet consisting of one page, and what looks to be, thirdly, like four separate notes to yourself or to the file. Is that correct?

A Some, I think, to myself and some to Representative Brooks Hines.

Q All right.

MR. CROWE: I will ask that these be marked as Plaintiff's 9 A and B.

(WHEREUPON, there was an off-the-record discussion.) [1328]

MR. SCREWS: Judge, give us just a second to make sure we are not duplicating exhibits.

THE COURT: All right.

MR. CROWE: Let the record reflect that we have renumbered Exhibit No. 9 to 9-A as 9-A, and No. 9-B which was not in the record, as both coming from the two documents that Mr. Vernon testified about.

(WHEREUPON, Fiscal Note, dated 7/17/79, and attached worksheet, marked for identification purposes as Plaintiff's Exhibit 9-A, was offered and received into evidence.)

(WHEREUPON, Fiscal Impact Analysis Worksheet, marked for identification purposes as Plaintiff's Exhibit 9-B, was offered and received into evidence.)

Q Do you have the original, Mr. Vernon, of 9-B in your file?

A I think that's it.

Q I have a little trouble reading this. I see on Exhibit 9-B of your notations, Mr. Vernon, some reference to 93 percent.

A Yes. After contacting the State Oil and Gas Board, we were informed that 93 percent of the oil and gas production was attributed to wells producing more than twenty-six barrels of oil per day.

[1329] Q So, in these calculations, then, in estimating these revenues, both in Fiscal Note 1 and Fiscal Note 2, you deducted, or did not include, production until the wells producing less than twenty-six barrels?

A I attempted to, yes, sir.

Q And I see in the upper right-hand corner of Exhibit 9-B something or other that I can't read. Can you read that to me. It's on the right-hand side of the Fiscal Impact Analysis Worksheet.

A Yes, sir. Mr. Massingale, Oil and Gas Board, 321-3000, provided information that Alabama has 887 oil producing wells with 264 wells producing less than twenty-six barrels per day.

Q All right, sir. Now, again, on 9-B, the reverse side, your note in the upper right-hand corner - - I can't read that - - it appears to say "Excluding the effect of your Bill on Natural Gas"?

A Yes, I think that memo does state that.

Q So, you excluded each and every well that did not produce twenty-six barrels of oil per day in your calculations?

A Acting on the information from the Oil and Gas Board, that 93 percent of the Alabama production came from wells producing twenty-six barrels or more production, using that percentage, the wells producing less than twenty-six were excluded.

Q All right. You didn't attempt to get the location of those particular wells, did you?

[1330] A No, sir.

Q But there was some 264, I believe you said?

A Right.

Q Now, you remember your deposition that we took earlier - - -

A Yes, sir.

Q - - on February 18, 1980. And I believe you stated there that "We were excluding that seven percent on all wells that produced less than twenty-six barrels of oil per day." Do you remember that?

A Right.

Q Now, referring back to your memo which has been marked as Exhibit No. 7 that you read to the Court a moment ago, who did you contact in the Department of Revenue in accordance with the last paragraph of that memorandum that states in part that the Department of Revenue had accepted the Escambia County interpretation as the intent of the Bill? Who did you contact?

A Mr. Lewis Easterly and Jack Mann.

Q What is Mr. Lewis Easterly's title with the Department of Revenue?

I think he's Secretary and he acts as Director of the Division of Statistics and Research and Liasion - - -

Q He is Secretary of the Department?

A Yes, sir.

Q Where did you contact Mr. Easterly and Mr. Mann?

A I talked to them just as the Finance and Taxation Committee was dispersing on the 17th of July of last year. I met them as everyone was going out the door.

[1331] Q And based on that, you prepared Fiscal Note No. 2, dated July 17, 1979. Is that right?

A Yes, sir, solely on that information. The Fiscal Note was changed.

Q Later, did you learn that a third interpretation had been rendered on this Bill to apply statewide by the Department of Revenue?

A Yes, sir.

Q The Legislative Fiscal Office is created by statute, is it not?

A That's correct.

Q And you are charged with the duty, among other things, of providing the Committee on Ways and Means of the House, and Finance and Taxation Committee of the Senate with financial information?

A That's correct.

Q And you're further charged with providing information with respect to revenues, receipts, estimated future revenues and receipts, and changing revenue conditions?

A That's right.

Q Before you spoke with the Secretary of the Department of Revenue, Mr. Easterly, had you talked with the sponsor of this Bill, Mr. Hines?

A I did.

Q Did he tell you that this was a local Bill to be applied to Escambia County?

A He - - he seemed to indicate that that was the purpose of the Bill.

[1332] Q Do you remember where you talked to Mr. Hines?

A In the House Chambers.

Q And that was before your conversation with the Revenue officials?

A Yes, sir.

Q So, you knew when you talked with the Secretary of the Department of Revenue that Mr. Hines' Bill was considered by him to be a local Bill. Is that correct?

A Yes.

Q And presumably, the Secretary of the Revenue Department, Mr. Easterly, already knew about the substitute in the Bill. Is that right?

A I think he was aware that after the hearing on the Bill in Finance and Taxation.

Q At any rate, he knew about it at the time you spoke to him?

A Yes, sir.

Q Look at Exhibit 9-A which is your calculations, Mr.

Vernon, with respect to Fiscal Note No. 2. It's on the back of the yellow Fiscal Note. Do you have it now?

A Yes, sir, I have it.

Q I see a notation down toward the bottom, "Percentages from Oil and Gas Board's letter to Brooks Hines of May 1, 1979." Is that right?

A Yes, sir.

Q Do you have a copy of that letter in your file?

A Yes, I do.

[1333] Q Would you tell us how you came into possession of a copy of that letter?

A During my conversation with Representative Hines in the House Chamber, he provided me with this letter.

MR. SCREWS: That's Exhibit 8.

MR. CROWE: Let the record reflect that the letter dated May 1 from the Oil and Gas Board to Mr. Hines which Mr. Vernon has produced today has previously been marked as Exhibit 8 for the Plaintiffs.

Q Based on that letter - - well, withdraw that. Was that the basis upon which you calculated or computed the figures in Fiscal Note No. 2?

A That, and some additional information from the Oil and Gas Board.

Q What information was that?

A The proper weights to use in computing a weighted average based on the well head value of oil and gas and condensate.

Q You say oil and gas and condensate?

A That's right.

Q Do you know the difference between oil and gas and condensate?

A Not really.

Q But, at any rate, in reaching these calculations, you

excluded each and every well which produced less than twenty-six barrels of oil per day. Is that right?

A Yes, according to the 93 percent percentage.

[1334] Q Or stated differently, you included every well that produced in excess of twenty-six barrels of oil per day?

A That - - -

Q In your 93 percent?

A That was what I was attempting to do with that 93 percent percentage.

Q And that twenty-six barrel well, less than twenty-six barrel well, that you excluded was based on the wording of the statute, was it not?

A Right.

Q That said that those wells were exempt from the increase or were taxed only at four percent?

A That's correct.

Q All right. Now, going to Exhibit No. 9-B, which is you calculation of Fiscal Note No. 1, can you tell us the date upon which you made those calculations?

A It would have had to have been around the 6th of June.

Q Look at the bottom right-hand corner, if you would, Mr. Vernon.

A I see a date of 4/24/79 but I'm not sure that - - I'm not really sure as to that.

Q Are those your initials "V.V."?

A Yes, they are.

Q And the date of 4/24/79 would have been before Mr. Hines substituted to put in the depth proviso on this Bill, would it not?

A That is correct.

MR. CROWE: No further questions.

[1335] MR. BRASWELL: No questions.

MR. SEALE: No questions.

MR. WAGNON: I have. Macbeth Wagnon, Alabama

Gas Corporation.

FURTHER DIRECT EXAMINATION

BY MR. WAGNON:

Q Mr. Vernon, did I correctly understand that in your calculations of the estimated revenue that you were taking into account the oil production, 93 percent of the oil produced in Alabama?

A I was attempting to get oil and gas production, but with the 93 percent of total statewide production attributing that to wells producing greater than twenty-six barrels per day.

Q Your understanding of that 93 percent figure was that it included both oil and gas production, or just oil?

A I was thinking that it was going to take care of both oil and gas.

Q Do you know which would be the correct interpretation of that figure?

MR. CROWE: I object to the form of that question.

THE COURT: I didn't hear it.

Q Do you know whether the figure that you used in your calculations represent based on information from the Oil and Gas Board both oil and gas production or just oil production?

A Well, I was attempting to get both oil and gas [1336] production since the Bill - - since the tax is on both oil and gas.

Q Did you get a single combined figure, or did you get separate figures?

A I only got one figure.

Q You don't have any information on the breakdown of the two?

A No, I don't.

MR. WAGNON: That's all.

THE COURT: Any other questions?

CROSS-EXAMINATION

BY MR. BRECKENRIDGE:

Q Mr. Vernon, I'll show you a document that has previously been marked at Plaintiff's Exhibit 7. Do you recognize that document?
A This is a photostat of the memo from me to Rex.
Q Is this correspondence that you originated yourself?
A No, Rex asked me to get a memo to him outlining our -- the reason behind our changing the Fiscal Note.
Q All right, but that's a letter you wrote?
A That's correct.
Q Would you read to the Court the first paragraph of the note, please?
A (Reading) The fiscal note to House Bill 148 as introduced carried an estimate of $5.4 million in additional tax revenue, as the Bill affected all in-state wells producing more than twenty-six barrels of oil per day.
[1337] Q So, at one time, it was your opinion, it's clearly your opinion that House Bill 148 applied to all wells in the State. Is that correct?
A That's correct.
Q Does your note mention Escambia County in any way?
A Either note?
Q No, just this document here, Plaintiff's Exhibit 7, mention Escambia County in any way, shape or form?
A Yes, it's in the last paragraph.
Q What does it say there?
A (Reading) The note was then changed upon contacting officers of the Department of Revenue who had accepted the Escambia County interpretation as the intent

of the Bill.

Q All right. Now, you say "changed upon contacting officers of the Department of Revenue." You say that these officers were Mr. Easterly, Lewis Easterly?

A Right.

Q Now, what did Mr. Easterly say to you?

A I can't quote him exactly, but in essence he told me that the Bill would be interpreted as affecting Escambia County only.

Q Do you recall where this conversation took place?

A Within the Finance and Taxation Committee Room.

Q Within the Committee Room? Was the Committee in session then?

A No, they had just disbursed.

Q Did you attend the meeting?

[1338] A No, I didn't.

Q Well, could you tell me why you asked Mr. Easterly about House Bill 148?

A Various interpretations of the Bill were floating around the Capitol, I might say. Rex asked me to help him check and make sure whether the Bill was a local Bill or statewide Bill.

Q Mr. Vernon, couldn't you have determined this for yourself by attending the meeting?

A I could have, possibly, but during the session it's only read - - we can't attend all the meetings - - -

Q Are you very busy when the Session is convening?

A That's correct.

Q And was the reason that you were not able to attend the meeting because of your hectic schedule at the time?

A Yes, sir, that's true.

Q So, would it be fair to say, in fact, you based your interpretation upon a conversation you had with Mr. Easterly?

A That's - - -

MR. CROWE: I object to the form of the question.

He's already testified that he talked to Mr. Hines also.

MR. BRECKENRIDGE: Well, he can answer the question, Your Honor.

THE COURT: Well, overrule the objection.

Q Would it be fair to say that you based your interpretation of how to prepare the fiscal note based upon [1339] the conversation with Mr. Easterly?

A Yes.

Q Mr. Vernon, I show you a document that's previously been admitted as Plaintiff's Exhibit 9-A which, as I understand, is also a document that you prepared. Is that correct?

A That's true.

Q You prepared it for the Senate Finance and Taxation Committee?

A That's correct.

Q Now, what is the purpose of preparing such a document?

A To inform the Legislators as to the fiscal impact of various pieces of legislation, the amount of money involved and the funds affected, and the dates -- the fiscal years when the impacts take place.

Q Do the members of the Senate Finance and Taxation Committee have an opportunity to use this material that you give them?

A They read it upon request. It's available to them.

Q You say it's available to them, you mean you provide that to them prior to the meeting or after the Legislators have gone home, or just when do you give it to them?

A We deliver to them as soon as the Bill is being taken up in the Committee, sometimes it's read and sometimes it's not read.

Q In other words, it's fair to say that they have the fiscal note prior to their voting on in Committee?

[1340] A They do [sic] not have this one.

Q They have one similar to this. Is that correct?

A Without these estimates.

Q What do they have?

A They had the 5.4 Million Dollar estimate when they considered the Bill.

Q In other words, you're telling me that the members of the Committee, when they considered the Bill, they didn't have your revised estimate but they still had the original estimate that applied - - that, in fact, would raise the statewide tax to 5.4 Million Dollars. Is that correct?

A That's correct.

Q So, the members of the Committee didn't even have your - - I guess you'd call it, your fiscal note at the time they voted. Is that correct?

A It wouldn't have been any way for them to have it.

Q All right. Now, could you look at the fiscal note that you have there and tell the Court whether or not Escambia County is mentioned in your revised note?

A No, it's not.

Q Is there any way anyone not familiar with your conversation with Mr. Easterly and Mr. Hines could know that that document applied to Escambia County?

MR. LEONARD: Objection. Supposition.

THE COURT: Overrule the objection.

A Would you repeat the question?

Q All right. Is there any way that anyone reading your [1341] fiscal note and who was not privy to your conversations with Mr. Easterly and your prior conversations with Mr. Hines could know that that note in any way denoted a local Bill applying to Escambia County?

A No - - I don't think there is any way that they would have known it.

Q Okay. Now, you stated that you didn't attend the Finance and Taxation Committee, that you came in after they had adjourned.

A Right.

Q Just to touch all bases, did you attend the House Ways and Means Committee meeting?

A No, I didn't attend that one either.

Q So you weren't privy to any conversations between Mr. Hines and Mr. Owens, and you don't know what went on there?

A No.

Q Let me see if I understand your previous testimony. You stated in preparing the note in regard to the twenty-six barrels of oil per day exclusion, that you thought in preparing the note, that you were including all gas wells and all oil wells in the State that produced over twenty-six barrels of oil per day. Is that correct?

A Yes, sir.

Q Why did you do that?

A Well, that was the language in the Bill.

Q The language in the Bill was clear to you that the [1342] House Bill 148 meant to impose a six percent severance tax on gas wells?

A My impression of the Bill was that it intended to raise the tax rate, previous to my conversation with Mr. Easterly, on all wells producing more than twenty-six barrels per date [sic] statewide.

Q Now, you say all wells, does that include gas wells?

A Yes. right.

Q In your opinion, it did?

A Right.

Q And you stated you can't remember exactly what Mr. Easterly told you. It was just a conversation in passing. Is that correct?

A Right. I simply asked him what was his impression of the Bill, how he thought it might apply.

Q Well, would it have been possible for you to say, asked him, what went on in the meeting since you missed it? What happened here?

A I don't think that's what I asked him.

Q If he said that is what happened, would you be able to refute him?

A No. I just don't seem to remember it that way.

MR. BRECKENRIDGE: Thank you.

REDIRECT EXAMINATION

BY MR. CROWE:

Q You didn't attend the Senate Finance and Taxation Committee meeting?

A No, I didn't.

[1343] Q You don't know what Bills were discussed that day then?

A No, sir.

Q You don't know whether 434 was discussed that day?

A 148?

Q 148.

A Yes, I know that it was discussed that day.

Q How do you know that?

A I don't recall how I know, but I do seem to know that.

Q But you weren't present, were you?

A That's right, I was not present.

Q The note would not have been present in the Senate, would it not?

A The revised note? Yes, it was changed from the F and T meeting so that it would have been available for the Senators the next day on the floor.

MR. CROWE: No further questions.

RECROSS-EXAMINATION

BY MR. BRECKENRIDGE:

Q Mr. Vernon, about this last issue that has been raised, so the revised note was available to the Senators who were voting on the Bill on the floor of the Senate. Is that correct?

A It would have been available. It was prepared by that time.

Q Now, in your opinion, and you're familiar with the notes, the revised notes, would there be any way for a Senator who had not attended the Senate Finance and Taxation Committee meeting and who only saw your note in front [1344] of him, would there be any way for him to know that was a local Bill that was intended to apply to Escambia County if that was the case?

A Not to my knowledge, there wouldn't have been any way for him to - - -

Q Is there any legal way you can think of?

A No, sir.

MR. BRECKENRIDGE: No further questions.

FURTHER REDIRECT EXAMINATION

BY MR. WAGNON:

Q Do you have Exhibit 7 there in front of you?

A I'm not sure.

Q It's the Legislative Fiscal Office Memo dated February 18, 1980. It was earlier submitted. I'm wanting 9-B, the one with your calculations on it. What about 9-A, the one with these notes here on it.

MR. CROWE: That's the wrong one.

MR. WAGNON: I'm sorry. I just want to find the

exhibit that has the Legislative Fiscal Office Memorandum on it. Has that been introduced?

MR. SCREWS: I think it is 9-B. This is our file copy. It should be 9-B.

MR. WAGNON: With the calculations?

MR. SCREWS: Yes.

Q That looks like it. This appears to be the back side of No. 9-B. Now, at the top of this Exhibit, as it is photostated, this appears to be two memo notes. Did [1345] you write those?

A Yes, sir, I did.

Q Were those your impressions concerning the legislation at the time you wrote those?

A Right.

Q And the one on the left side of the page, you're recording information from the Oil and Gas Board?

A Yes.

Q Would you read that first sentence, please?

A (Reading) Checked again with the Oil and Gas Board and was informed that 93 percent of the oil and condensate production from Alabama wells is produced by wells generating greater than twenty-six barrels per day.

Q No reference to gas in there?

A No, sir.

Q Now, that was the information you got from the Oil and Gas Board?

A Yes. Maybe I misinterpreted but - - -

Q But that was the way you did interpret it?

A Well, at that time, yes, sir.

Q Now, would you read then the first sentence of this other memo that you wrote to Representative Hines?

A (Reading) Excluding the effect of your Bill on natural gas, oil wells with production greater than twenty-six barrels per day will account for 93 percent of the State's

oil and condensate production.

Q And the 93 percent there, you refer again to oil and condensate, but excluded gas?

[1346] A That's correct.

MR. WAGNON: Thank you.

THE COURT: Is that it, gentlemen?

MR. BRECKENRIDGE: No further questions, Your Honor.

MR. CROWE: May we excuse him, Your Honor.

MR. BRECKENRIDGE: The Defense has no objection, Your Honor.

THE COURT: All right.

MR. SCREWS: John, we may can stipulate to this. We have in the courtroom, Mr. John Lockett, who is with the Secretary of State's Office, and who has prepared under the Seal of the Secretary of State, a document remarked as Plaintiff's Exhibit 16 that is the legislstive history of Act 434 as reflected by the House Journal and Senate Journal and the Acts of Alabama.

MR. BRECKENRIDGE: We have no objection, Your Honor.

THE COURT: All right.

MR. SCREWS: We offer Exhibit 16.

(WHEREUPON, the Legislative History of Act No. 434 prepared by the Secretary of State's Office,

marked for identification purposes as Plaintiff's Exhibit No. 16, was offered and received into evidence.)

MR. SCREWS: May it please the Court, we have five stipulations that the State has agreed [1347] with us on facts that have been signed both of - - all five have been signed by me, as Attorney, and by John Breckenridge, as Attorney for the State. I would like to read one into evidence and then make comments on the other ones where they may differ.

We introduce as Exhibit No. 11 the Union Oil Company of California stipulation.

STIPULATION OF UNION OIL COMPANY

MR. SCREWS: (Reading) The parties stipulate and agree on the following facts, as evidence in this cause:

The plaintiff Union Oil Company of California is a California corporation authorized to do business in the State of Alabama, with its principal office and place of business in Alabama being in Mobile, Alabama.

Plaintiff is engaged in the exploration for and the production of oil and gas within the State of Alabama and has at all times material herein and at the present time achieved production of natural gas from wells located primarily in Mobile County, Alabama, which wells were drilled by and are operated by Plaintiff. Plaintiff also owns fractional shares of gas production in other wells and/or production units in which plaintiff is not the operator. Said units were duly established by order of the Oil

and Gas Board of Alabama.

None of the Union Oil Company wells, nor any of the wells in which Union Oil owns fractional shares, nor [1348] any of the production units in which Union Oil has an interest produces oil or gas from the interval between 15,000 and 15,800 feet in the Smackover Formation nor produce oil or gas in Escambia County, Alabama.

Union Oil Company paid under protest the two percent increase in such severance tax which the Alabama Department of Revenue contends was intended by Act 434, 1979 Regular Session of the Alabama Legislature. With respect to the tax increase imposed by Act 434, plaintiffs have paid their taxes under protest, and defendant waives the necessity for proof as to times and amounts of payments. If the Court rules that plaintiffs are entitled to a refund, defendant and plaintiff are confident that they can agree as to the amounts which should be refunded; if the parties cannot agree, appropriate evidence may be submitted later.

On September 1, 1979, and at the present time, the plaintiff was a party to a contract with United Gas Pipeline Company which contract pertained to gas produced in Alabama. Said contract contained provisions stating that United Pipeline shall pay or reimburse Union for 100 percent of the taxes paid by Union with respect to gas sold thereunder. Article IV, Section D of said contract of September 1, 1979 provides:

"D. Tax Reimbursement.

"Plaintiff agrees to reimburse seller" - - it should be plaintiff - - [1349] "for one hundred percent of

the taxes sold per thousand cubic feet paid by seller with respect to gas sold hereunder."

In addition, Union, at all times material, was operating under an agreement with Phillips Petroleum pertaining to the sale to Phillips of oil produced by Union in Alabama, which said agreement provides that:

"Buyer shall reimburse seller for 100 percent of the amount by which any severance taxes paid by seller are in excess of the rates of such taxes levied as of April 1, 1976."

At all times material herein, the plaintiff was a party lessee to various oil and gas leases which provides that lessor shall pay out of lessor's royalty interest any increase in severance taxes. A typical example of such lease is one dated November 30, 1972 between International Paper Company, as lessor, and Union Oil Company as lessee. Paragraph 6 of said lease provides as follows:

"6. TAXES: LESSOR AND LESSEE shall bear in proportion to their respective participation in the production hereunder, all taxes levied on minerals covered hereby or any part thereof, or on the severance or production thereof, and all increases [1350] in taxes on the lease premises or any part thereof . . . "

A substantial portion of plaintiff's oil and gas production is sold in interstate commerce or is sold by others in interstate commerce.

Plaintiff's oil and gas purchasers are non-consumer purchasers, some of which are interstate carriers who in turn sell in interstate commerce. Plaintiff's purchasers, in turn, have pass-through clauses or provisions in their contracts which allow increased severance taxes to be "passed on" to others.

The plaintiff is a producer-operator and is not a non-operator producer or consumer.

Union is the owner of a royalty interest in Mobile County, Alabama, free and clear of all cost of development but subject to proportionate shares of severance tax. Said royalty interest was carved out of Union's leasehold estate when it assigned the same to other parties for drilling certain wells in Mobile County. This royalty interest is commonly referred to as "overriding royalty interest."

(WHEREUPON, Stipulation of Union Oil Company, marked as Plaintiff's Exhibit No. 11 for identification purposes, was offered and received into evidence.)

MR. SCREWS: The next one is Exhibit 12. We have a similar exhibit, No. 12, for Getty Oil Company. The only changes are the quotations [1351] from oil and gas contracts or leases.

(WHEREUPON, Stipulation of Getty Oil Company, marked for identification purposes as Plaintiff's Exhibit No. 12, was offered and received into evidence.)

MR. SCREWS: No. 13 is the Exchange Oil and Gas Company stipulation which is in all material parts

is the same as the other two with the changes pertaining to Exchange Oil, the different leases and contracts.

(WHEREUPON, Stipulation of Exchange Oil and Gas Company, marked for identification purposes as Plaintiff's Exhibit No. 13, was offered and received into evidence.)

MR. SCREWS: And the same is true for Terra Resources as Plaintiff's Exhibit 14.

(WHEREUPON, Stipulation of Terra Resources, Inc., marked for identification purposes as Plaintiff's Exhibit No. 14, was offered and received into evidence.)

MR. SCREWS: Placid Oil Company is Exhibit 15 which is the same and is true where we quoted articles on pass-through provisions, and actually Placid sells oil that is consumed [1352] within the State of Alabama and we quoted that.

(WHEREUPON, Stipulation of Placid Oil Company, marked for identification purposes as Plaintiff's Exhibit No. 15, was offered and received into evidence.)

MR. CROWE: We call Mr. Montrose.

[Record page 1352]

PETER RENEAU MONTROSE

The witness, called on behalf of the Plaintiff, was duly sworn to speak the truth, the whole truth, and nothing but the truth, and testified as follows:

DIRECT EXAMINATION

BY MR. CROWE:

Q State your full name and address, Mr. Montrose.
A Peter Renau [sic] Montrose, Sixteenth Floor, 1010 Commerce Street, New Orleans, Louisiana.
Q By whom are you employed?
A Exchange Oil and Gas Corporation.
Q What is your job with Exchange?
A I am Exchange's in-house lawyer.
Q Do you have a law degree?
A Yes, from Tulane, in 1941.
Q How long have you been engaged in the legal business in connection with the oil industry?
A Since 1953.
Q You are, then, familiar with the industry, the lease forms and contracts and the matters that have been [1353] stipulated to with respect to these various plaintiffs. Is that correct?
A Yes.
Q Does Exchange own any portion of the IP lease - - -
A Yes.
Q - - that was previously described in the stipulation?
A Yes. We own a small portion. We're under a farm out from Union and we have one producing well under the farm out.
Q Under that lease what is the royalty?
A One quarter.
Q Does IP have a right to take the hydrocarbons produced from that well that you described in kind?
A Yes, sir, both as to oil and gas.
Q And do they have to take them in kind?
A No, they do not. If IP does not elect to take in kind, it can require Exchange to purchase its royalty share of the oil.
Q So, the royalty share, it's at the option of the lessor here, IP. Is that correct?

A That's correct.

Q Now, the IP lease requires and provides that each party will bear its own proportionate share on its ownership of severance taxes, does it not?

A That is correct.

Q What would be your quarrel, Mr. Montrose, with the royalty exemption, purported royalty exemption, included in Act No. 434, as it would apply to and effect [1354] the International Paper Company lease, the twenty-five percent royalty?

A Well, in my opinion, it would impose an obligation on Exchange that is not so imposed by the lease contract.

Q Would it in effect, Mr. Montrose, require the lessee to pay taxes on property owned by the lessor?

A That is correct.

MR. CROWE: No further questions.

MR. BRASWELL: No questions.

MR. BRECKENRIDGE: No questions.

MR. CROWE: Mr. Everett.

[Record page 1354]

WILLIAM H. EVERETT

The witness, called on behalf of the Plaintiff, was duly sworn to speak the truth, the whole truth, and nothing but the truth, and testified as follows:

DIRECT EXAMINATION

BY MR. CROWE:

Q State your name and address, please, sir.

A William H. Everett, 5416 South Yale Avenue, Tulsa, Oklahoma.
Q By whom are you employed?
A Terra Resources, Incorporated.
Q What is your educational background?
A I have a Bachelor of Science in Marine Engineering and a Jurisdoctorate Degree, the JD from the University of Nebraska.
Q How long have you been employed by Terra?
[1355] A A little over six years.
Q And in what capacity?
A I'm their General Counsel.
Q And prior to that time did you practice law?
A I had six years in private practice in Casper, Wyoming.
Q You, then, are familiar with oil and gas laws in the oil and gas industry?
A Yes, sir.
Q We have been talking, Mr. Everett, here throughout the testimony today about the units, the drilling units, and producing units. Do you know who establishes those?
A They are established by the State regulatory bodies which have jurisdiction over oil and gas production.
Q And do you know who that would be in the State of Alabama?
A It's the Alabama State Oil and Gas Board.
Q Is it true, Mr. Everett, that the Alabama Board, and indeed, all oil and gas boards, establish a larger unit for oil production than for gas?
A Yes, sir. It's the other way around. It's larger for gas units than oil.
Q Does Terra Resources act as an operator in Alabama?
A Yes, sir.
Q Now, in the nomenclature of the industry, what is an operator?
A An operator is any legal person, a person, firm, corporation, which has the responsibility for drilling in either abandoning or completing wells on a lease, and [1356] if a well is completed, it has the responsibility for the

continued production of the well and maintenance of the well and leasehold.

Q He's the one that drills the well?

A Yes.

Q Does he in all cases pay for that well a hundred percent?

A No, sir.

Q Are there others in the unit, whatever size or configuration, that would own an interest?

A That's the most often the case.

Q And what is that interest called?

A Well, if it is an interest in the leasehold other than the land owner's interest, it is a part of the working interest.

Q And why do they call it the working interest?

A Because those interests pay their proportionate share of the cost of production, that is, the actual lifting cost or whatever cost may be associated with the maintenance of the well.

Q They, then, would be lessees or assignees of lessees of the landowner?

A Yes, sir.

Q And would those parties who do not operate and who do not drill the well but who own a working interest, would they pay their proportionate share of the severance taxes?

A Would you please state the question again?

Q Would the working interest in the unit, non-operators, [1357] pay their fair share of the severance tax?

A Yes, as a general proposition, that is correct.

Q What is a royalty?

A As it is known in the oil and gas industry, it is a share of the production from an oil or gas well which is owned by the lessor or the landowner, the owner of the minerals in place.

Q Can there be a royalty interest in favor of someone who is not a landowner?

A Yes, sir, there can be overriding royalties which generally are interests carved out of the working interest.

Q Now, both types of royalties, that is, landowner royalty and overriding royalty are generally free of the cost of development. Is that correct?

A Yes, sir.

Q Is there any standard percentage of royalty to a land owner?

A No, sir.

Q How is the percentage of royalty arrived at?

A It's a bargained percentage. Generally, it is an eighth. For a long period of years, it was an eighth as almost a standard, but it now varies widely from place to place.

Q Does Terra have a number of leases under which severance taxes are to be paid and borne by the royalty interest?

A Yes, sir, as a general proposition, that is, as a matter of oil and gas law.

[1358] Q I am going to show you the Exhibit "A" to the Terra Stipulation being Plaintiff's Exhibit No. 14, which is a lease from Gary Weeks in favor of Terra Resources, and ask you if that is one of the leases that Terra has of which you spoke?

A Yes, sir, it is.

Q And does that lease - - is it in force today?

A It is in force today.

Q And does that lease require the royalty to bear its fair share or proportionate share of the severance taxes based on ownership?

A Those specific words are not in th[illegible]orm of lease. There are certain items which are set fo[illegible] in this form of lease which are required to be paid by the royalty owner. They are universally unless there is some special arrangement within a lease paid on a prorata basis by the entire, the owners of the entire production from the well.

Q Would that lease that you have in your hand, in your opinion, call for the payment of the royalty share of the severance tax to be paid by the royalty owner?

A Yes, sir.

Q What is the date of that?
A It's dated February 28, 1977.

MR. CROWE: No further questions.

MR. BRASWELL: No questions.

MR. SEALE: No questions.

[1359] FURTHER DIRECT EXAMINATION

BY MR. BLACK:

Q Mr. Everett, let me ask you a question. Are you familiar with Senate Bill 739 concerning teritary [sic] recovery?
A No, sir, I'm not. Is this an Alabama Bill?
Q Yes, sir.
A I'm afraid I'm not.
Q Do you know what teritary [sic] recovery is?
A Yes, sir, I do.
Q Would you tell the Court what teritary [sic] recovery is?
A Well, after initial production from the field there may be an enhanced recovery program such as an injection program of water or gas or something of that nature which will yield further hydrocarbons, and after that program is finished, if there is still hydrocarbons in place, it can be economically raised by another enhanced recovery program, that would be a teritary [sic] recovery program.
Q Is it more expensive than the normal type recovery?
A Yes, sir.
Q Are severance taxes considered part of the -- what we'll call operating cost?
A No.
Q It's not? Then how how are they considered then in the industry in accounting procedures so far as -- how are they treated? What are they treated as, Mr. Everett?

A They are treated as a tax.

[1360] Q A tax?

A For whichever - - if it's the operator who accounts for the proceeds for production, the tax is divided against the entire production by the percentage of the applicable share of each of the producers and is charged back or withheld from their proceeds.

Q Do you know whether or not certain geographical regulations that the overriding royalty interest owner is required by law to pay his fair share of all the expenses including the taxes?

A I do not know.

MR. BLACK: No further questions.

CROSS-EXAMINATION

BY MR. BRECKENRIDGE:

Q You gave us a definition earlier about what you considered to be the definition of producer-operator within the oil and gas industry itself. Do you remember that?

A An operator.

Q An operator?

A Yes, sir.

Q Do you consider an operator to be the same thing as a producer?

A No, sir.

Q All right. Are you aware that there is a definition in the Alabama Oil and Gas Severance Tax Law that defines what a producer is?

A Yes.

[1361] Q You say you are familiar with it?

A I'm familiar - - I'm aware that there is a definition in that law.

Q Would you say that within the definition of the law, a producer is substantially the same thing as an operator

that you defined earlier?

A I don't know. You would have to let me look at the statute.

MR. SEALE: For the record, John, what statute are you having him refer to?

A This is 40-20-1(8). I would say that that definition substantially covers what an operator is. An operator could be included in that definition.

Q Right. Could a royalty interest owner also be included in that definition?

A Yes, sir.

Q Okay. Now, let me ask you something else, Mr. Everett. Do you know what the term stripper well means?

A I know that there are such things as stripper wells, yes.

Q Sir, I'm sorry, I didn't hear you.

A I do know that there are stripper wells, yes.

Q What does a stripper well mean within the oil and gas industry?

A Well, it means anything which is called a stripper well by the Department of Energy or the Federal Energy Regulatory Commission under certain Federal Statutes.

Q What is the function of a stripper well?

[1362] A Well, the function of having the well defined is to either control the price of or the rate of tax upon certain wells.

Q What is the stripper well function in the field? What does it do? Extracts oil or gas, doesn't it?

A Sure.

Q Why do they call it stripper well? Why do they distinguish between these wells and any other wells?

A Well, I suppose because they are defined as stripper wells in the statute.

Q In the statute? You mean the Federal Statute or - - -

A In the Federal Statute, yes, sir.

Q What is the definition then in the Federal Statute?

A Well, as to oil well - - -
Q Essentially.
A Essentially. Well, it's certain wells which produce less than a certain number of barrels or a certain number of Mcf over a period of time.
Q All right. Now, would this be a large number or a small number relatively of barrels of oil - - -
A Relatively small.
Q Relatively small. Would you say less than forty barrels then?
A Yes.
Q Less than twenty-six?
A Yes.

MR. BRECKENRIDGE: No further questions.

[1363] REDIRECT EXAMINATION

BY MR. SEALE:

Q Mr. Everett, are you familiar with Act 434 passed in the 1979 Regular Session of the Alabama Legislature?
A Generally, yes, sir.
Q Have you read that Act, sir?
A Yes.
Q Do you recall anywhere in that Act any reference to stripper wells?
A No, sir.
Q Are you familiar with the Department of Energy Regulations relating to stripper wells?
A Yes.
Q Under those regulations is a stripper well a well that produces ten barrels or less per day of oil?
A Yes, sir.
Q And for gas is it 60 Mcf's per day or less?
A I believe so, yes, sir.

MR. SEALE: Thank you, sir.

FURTHER REDIRECT EXAMINATION

BY MR. CROWE:

Q Are there stripper oil wells as well as stripper gas wells?
A Yes, Sir.

MR. CROWE: No further questions.

Mr. BRECKENRIDGE: No further questions.

MR. SEALE: I have no further questions, Your Honor.

* * * * * *

[Record page 1459]

LEWIS EASTERLY

The witness, called on behalf of the Defendant, was duly sworn to speak the truth, the whole truth, and nothing but the truth, and testified as follows:

DIRECT EXAMINATION

BY MR. BRECKENRIDGE:

Q Would you state your name for the record, please?
A Lewis Easterly.
Q Mr. Easterly, what is your address? Where do you reside at?
A 4417 Pepper Avenue, Montgomery, Alabama.
Q Mr. Easterly, who is your employer?
A State of Alabama, Department of Revenue.
Q And what is your position with the State of Alabama, Department of Revenue?
A I'm Secretary of the Department of Revenue and Acting Chief of the Research Division.

Q How long have you been Secretary of the Department of Revenue?

A Since the 16th of January, 1979.

Q And how long have you been Acting Chief of the Department of Revenue?

A Since the same date.

Q What are your duties as Secretary of the Department of Revenue?

A I'm primarily responsible for the official records of the Department in the sense of keeping what we call the Minutes Book of the Department where all resolutions, [1460] rules, regulations, appointments to board of equalizations, etc. That is my primary duty as Secretary of the Department. I also attest to various signatures within the Department, and sign subpoenas, etc.

Q What are your duties as Acting Chief of the Research and Liaison Division?

A I have many duties in that. I am primarily in charge of certain administrative functions for the Department. I am budget Officer for the Department, Chief Accountant, and I also serve as Legislative Liaison for the Department.

Q Legislative Liaison, does that mean that your office is responsible for having charge of relations between the Department of Revenue and the Legislature?

A Yes, we're the primary agency.

Q Were you Chief of the Research and Liaison Division in July and August of 1979?

A That is correct.

Q As part of your duties as Chief of the Research Division, does you office prepare Fiscal Notes at the request of Legislators or others for various Bills introduced in the Legislature?

A No, we do not.

Q Do you provide information concerning taxes and anticipated revenues to the Legislative Fiscal Office upon their request?

A We will provide an analysis of a given Bill if they request

it.

[1461] Q Are you familiar with House Bill 148 of the 1979 Regular Session?

A Yes.

Q Did your office or did you prepare a revenue analysis on House Bill 148?

A Yes, we did.

Q What type of analysis did you perform?

A We performed a fiscal analysis of the Bill as introduced.

Q Mr. Easterly, I want to show you a document that has previously been introduced as Plaintiff's Exhibit 7 and ask you to read it over, particularly the last two paragraphs of the letter. You note that the letter states that certain revenue officers were contacted by Mr. Victor Vernon and that based on this contact he believes that certain officers in the Department of Revenue had accepted the interpretation that House Bill 148 applied solely to Escambia County. Now, previous testimony has indicated that Mr. Vernon says that it was you he contacted, and in the conversation between Mr. Vernon and yourself, he says that this is on what he based his changed position. And I ask you were you contacted by Mr. Vernon in reference to House Bill 148? Were you contacted by him?

A No, sir.

Q Did you ever tell Mr. Vernon that the Revenue Department had changed its interpretation of House Bill 148 on a revenue measure applicable statewide as to one that [1462] applied solely to Escambia County?

A Not to my knowledge, no, sir.

Q Do you ever remember having any conversation with Mr. Vernon regarding House Bill 148?

A Yes, I do.

Q Where did this conversation take place?

A I recall, to the best of my knowledge, a passing conversation following a committee meeting in the State Capitol.

Q A committee meeting. Would this be the committee meeting of the Senate Finance and Taxation Committee?

A Yes, it would.

Q How long did the conversation last?

A A few seconds at the most. It was strictly a conversation in passing.

Q A few seconds. Would it be fifteen seconds?

A I have no idea of the time. He asked me a question and I responded.

Q Would it be more than a minute?

A I -- no, I would say -- no.

Q Do you remember exactly what was said?

A No, sir, I do not.

Q Well, do you remember substantially what was said?

A Yes.

Q Tell the Court substantially what the gist of the conversation was.

A To the best of my memory, I came out of the Committee meeting , Mr. Vernon asked me a question in regard to [1463] what had transpired on a particular Bill and I told him that yes. He asked me what happened on House 148. He said something to the effect that Brooks Hines says he has an amendment that he will change this to a local Bill and passed on.

Q That was all that was said?

A To the best of my memory, yes, sir.

Q You are sure you didn't tell Mr. Vernon that the Department of Revenue was changing its interpretation on House Bill 148? Is that correct?

A That is correct.

Q You're positive of that?

A Yes, sir. Right. We never changed our interpretation of the Bill.

Q To your knowledge, has the Department of Revenue ever changed its interpretaion of House Bill 148?

A To my knowledge, no.

Q Well, how does the Department interpret House Bill 148, to apply statewide or solely to Escambia County?

A House Bill 148 was introduced as strictly a general piece of legislation and we continued throughout and still do to maintain that it is a general Bill affecting state - - it applies statewide.

Q And you're certain that you never told Mr. Vernon that the Department of Revenue had changed its position?

A Yes, sir.

MR. BRECKENRIDGE - No further questions.

[1464] CROSS-EXAMINATION

BY MR. CROWE:

Q You were present in court yesterday, were you not?

A Part of the time, yes, sir.

Q You heard Mr. Vernon testify?

A No, sir, I did not.

Q Have you read your deposition?

A Yes, sir.

Q What was the occasion for your being at the Finance and Tax Committee meeting on this particular date?

A I had been called to - - I'll won't say testify - - I had been called about another matter, another Bill.

Q You attended the Committee meeting then?

A Yes, sir.

Q You told Mr. Breckenridge that you prepared - - I think you said an analysis of this Bill?

A That is correct.

Q Has it been introduced? Did you bring it with you?

A No, sir, I didn't bring it with me.

Q It was prepared by you?

A Yes, sir, in my office.

Q Did that analysis of Act 434 contain a statement that the caption of the Bill does not agree with the body of the Bill as it does not mention the exemption?

A I believe it does. I don't have it in front of me.
Q You prepared it, though?
A It was prepared in my office.
Q Yes, sir, and we discussed it in the deposition two or [1465] three days ago?
A Yes, sir.
Q And it does contain that statement, does it not?
A I believe it does, yes, sir.
Q All right. I believe you told, if I understood you correctly, Mr. Breckenridge that the analysis was performed when the Bill was introduced?
A That is correct, sir.
Q Did you or anyone in your department make any effort to track this Bill through the legislative process in the House and/or the Senate?
A We track all Bills that we write on analysis on. So it would have been tracked. Yes, sir.
Q Did you track it?
A Are you speaking personally?
Q Yes.
A My office tracked it.
Q You were aware then of Mr. Hines' substitute?
A No, sir, not until the amendment was introduced.
Q Did you read the amendment?
A No, sir.
Q Did you have a conversation with Mr. Hines concerning that amendment?
A No, sir, I don't believe I did. I don't recall any conversation.
Q How did you get information concerning the Bill, the substitute for the Bill?
A I was not aware that there was a substitute Bill.
[1466] Q Was Mr. Hines at the meeting of the Finance and Tax Committee?
A Yes, sir, I seem to recall that he was.
Q Do you remember giving your deposition here several days ago on May 20th?

A Yes, sir.

Q Page 23, Line 8 - - do you remember giving your testimony, "Yes, sir, again, I recall Mr. Hines being there. I recall him putting in an amendment, and I recall specifically the Bill I was there on and testifying about. I can recall questioned [sic] in the hall as to what happened, you know, what happened in there". Do you remember that testimony?

A Yes, sir.

Q So you know that Mr. Hines substituted his Bill?

A I believe Mr. Hines had an amendment to his Bill rather than a substitute, sir.

Q Okay, an amendment to change it.

A All right. Fine. Okay. Yes, sir, he did amend his Bill.

Q And he told you that it would be a local Bill by virtue of his amendment?

A No, sir, he did not tell me that.

Q Did he tell the Committee that?

A To the best of my memory, I have an amendment. This will make it a local Bill. I don't know whether this was his exact words, but that was the substance of it, sir.

Q And you related that to Mr. Vernon?

[1467] A That is correct.

Q Do you remember exactly what Mr. Hines said?

A No, I don't remember the exact words. I just remember the substance.

Q Did he read the change?

A I don't recall whether he read it or not, sir. I really don't.

Q Do you know what the change was? Was it a depth proviso?

A Again, I said that's all I remember.

Q Is that all you remember?

A Yes, sir.

Q If the records from the Department of Archives show that the amendment we're discussing now was put into the House Ways and Means Committee approximately six weeks earlier on or about June 6th or 7th, 1979,

could you be mistaken about this?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule the objection.

A Could I be mistaken about what, sir?
Q I'm saying that if the records in the Archives show that the amendment, the Hines amendment, was put in at the House Ways and Means Committee on June 6, 1979, six weeks earlier than the Finance and Tax Committee met, assume that to be case, couldn't you be mistaken in your testimony here today?

MR. BRECKENRIDGE: Objection.

THE COURT: Overrule the objection.

A Exactly what testimony are you referring to? Maybe [1468] you lost me in that.
Q What I'm saying, if the amendment was put in in the House Ways and Means Committee and not in the Senate Finance and Tax Committee, couldn't that mean that your memory as to what was said to Mr. Vernon might be in error today?
A No, sir, because I recall the meeting in the Finance and Taxation Committee room, and as you know, that is on the opposite side of the Capitol.
Q And that is where the amendment was put in?
A Yes, sir.
Q All right. Now, you said a minute ago that you track Bills. What do you mean by track?
A We track them to determine their position in the legislative process whether they have had a first reading, second reading, etc.
Q Now, did you report to Mr. Vernon the amendment of Mr. Hines or did he report to you? In other words, did

you tell him about the amendment or did he tell you about the amendment?

A As I stated, sir, he asked me when I came out of the Committee meeting what happened and I told him that Brooks Hines had an amendment that he said would change it to a local Bill.

Q Did you do anything after that?

A No, sir, I was on my way out.

Q And this was a Bill that you had earlier, when it was first introduced, made an analysis of?

[1469] A Correct. Yes, sir.

Q So, you were familiar with the Bill in general?

A In general, yes, sir.

Q After Mr. Hines told you that, what, if anything, did you do to revise or change that analysis?

A We made no changes to our analysis.

Q What, if anything, did you do to check up on the substance of the amendment made by Mr. Hines?

A We didn't do anything.

Q Does the Department of Revenue get copies of Fiscal Notes that the Fiscal Office prepares?

A No, sir.

Q Never?

A No, sir, we do not.

Q Is that the only contact you had with Mr. Hines on this matter?

A Well, when you speak of contact, that's the only one -- I say him that day.

Q Was that the only contact you had with Mr. Hines with reference to this Bill at any time during the Session in 1979?

A Yes, sir, the best I can remember, that's correct.

MR. CROWE: No further questions.

FURTHER CROSS-EXAMINATION

BY MR. BRASWELL:

Q Mr. Easterly, isn't it correct that the Department of Revenue makes this analysis of the original Bill as [1470] originally introduced, speaking of revenue Bills?

A Yes, sir.

Q And that that anaylsis stands throughout the legislative process?

A Yes, sir.

Q Even though the Bill may be amended after it was originally introduced?

A That's right. Once we make the analysis, it stands with the Bill.

Q And while you track the progress of legislation, you don't obtain copies of the amendments or substitutes and analyze them or up-date your analysis. Isn't that correct?

A That is not quite correct. At times we have been sent amendments and asked to comment on them and we do this.

Q But as a matter of routine, you do not endeavor to obtain copies of amendments and substitutes for revenue Bills?

A That's correct. Yes, sir.

Q And in this particular case, you followed routine practice of making your analysis on the Bill as originally introduced?

A Yes, sir.

Q And you never did obtain a copy of the amendment or substitute?

A No, sir.

Q The way I stated it is correct?

A That's correct.

[1471] Q So, you learn that this particular Bill had been introduced - - that this particular amandment had been

made because you heard the sponsor say so?

A Yes, sir.

Q And you heard him say so in a formal legislative proceeding before the Senate Finance and Taxation Committee?

A Yes, sir.

Q And he characterized the Bill as being changed from general to local insofar as the taxing position?

A Yes, sir, to the best of my memory.

Q And that was your complete understanding of the Bill as it had then been revised by amendment?

A When you say my complete understanding of the Bill as revised by amendment?

Q Right.

A I really didn't consider that, you know, that the amendment did or did not change the Bill.

Q Well, you had a new understanding of some sort by virtue of you having heard Mr. Hines testify in the Senate Finance and Taxation Committee that the Bill was no longer general statewide in nature but was local?

A I heard him say that. That's correct.

Q So, the source of that new understanding came only from Mr. Hines in that Committee hearing?

A Yes, sir. The only knowledge that I had of this amendment was what Mr. Hines said.

Q And the entire knowledge that you had of the amended [1472] Bill was passed on to Mr. Vernon when you told him of what Mr. Hines had said?

A I just reported to him, as I said, what I knew.

MR. BRASWELL: That's all.

MR. SEALE: No questions.

REDIRECT EXAMINATION

BY MR. BRECKENRIDGE:

Q Mr. Easterly, did you see the amendment that Mr. Hines was referring to?

A No, sir.

Q So, you didn't have any opportunity to know whether or not it did what Mr. Hines thought he was doing with it or not. Is that correct?

A That's correct.

Q Have you seen it since? Have you had an opportunity to see the depth proviso amendment of Act 434?

A I saw the Bill after it was passed.

Q Well, in your opinion, does it change it from a general Bill to a local Bill?

MR. SEALE: Objection.

MR. ARENDALL: Objection. It's a question before the Court.

THE COURT: Well, it is a question before the Court, and I will determine it, but I would like to hear what this gentleman has to say and how he sustains his position.

Q You may answer the question.

[1473] A No, sir. When a general Bill is introduced, I feel that it is a general Bill. You can't amend a general statute as that. When you start to amend as a general statute and amend the entire law, you know, you have to continue on that. A general Bill is a general Bill is what I am trying to say.

Q What do you think the depth proviso refers to?

A What do I think the depth proviso - -

Q Well, instead of additional increase - - would you like to see a copy of the Bill?

A Yes, I would.

MR. BRECKENRIDGE: Your Honor, I want to point this out to him.

THE COURT: Point it out to him and let him do the testifying.

MR. BRECKENRIDGE: Yes, sir. I just wanted to caution everybody I'm not putting anything in his ear.

Q Now, what -- have you had a chance to read the proviso yet?
A Yes, sir.
Q Now, what is said of additional increases, in your opinion, does that refer to?
A Let me read it just a second.
Q Take all the time you need.

THE COURT: I thought you had asked him a difficult question.

Q You notice the language of the statute reads --

[1474] MR. CROWE: I object to the form of the question.

THE COURT: Overrule the objection.

Q You notice the language of the statute reads, "Provided, however, that said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the Smackover Formation." Do you notice that?
A Yes.
Q Now, what does the term, in your opinion, said additional increase refer to? Which increase does it refer to?
A You mean in the tax rate, increased tax rate, or -- I'm really not following you.

THE COURT: Is it applicable to the previous sentence or the two previous sentences?

Q Is it applicable to the sentence at the top of Section 1 or is it applicable to the Section immediately preceding the depth proviso?

A Okay. I'm thinking.

Q Well, which one does it refer to, Mr. Easterly, in your opinion?

A To me, the Bill reads that the amount of the tax shall be measured at the rate of six percent of the gross value of state oil and gas at the point of production, and that was the original Bill as it came down. The "Provided, such additional increase," would appear to me to be limited to the exclusion in here, to those wells producing.

THE COURT: That wasn't the question.

[1475] A I mean, I - - well, okay.

THE COURT: What does this provide - -

THE WITNESS: Right here, sir?

THE COURT: It did something, now what did it do?

THE WITNESS: Well, this additional increase - - this Bill - - this sentence limits the increase to certain wells between 15,000 and 15,800 feet in the Smackover Formation.

Q You mean the increase in wells that go into production ten years after the - - continues after the enactment of the Bill, or do you mean the increase that goes to production on all wells throughout the State?

A Again, I was reading the Bill. I'm sorry.

Q Do you mean increase on the wells that go into production ten years after the effective date of the Act, the new wells, or does it apply to the increase on all the wells statewide? Is it limited solely to the wells that go into production and are not increased until ten years after they go into production after the effective date of the Act, or is it on wells statewide, all the wells statewide?

A The Bill reads to me, and I have taken it out of context which I'm certainly not an attorney and not- -

THE COURT: I'll tell you what we can do. You analyze these, don't you?

THE WITNESS: Yes, sir. I made the original analysis.

THE COURT: Why don't we give you a five minute [1476] break to read that over, or ten minutes, and you read it over.

THE WITNESS: Okay. You kind of caught me off guard here.

MR. BRASWELL: Judge, is his analysis to be performed by himself only?

THE COURT: Yes, sir.

MR. CROWE: We can put Mr. Breckenridge on - -

THE COURT: Well, you all can cross-examine him on that.

(WHEREUPON, after a brief recess, Court reconvened and the following occurred:)

Q Mr. Easterly, why couldn't you answer the question

that I asked you previous to the recess?

A Well, as I told you as soon as I walked off the stand, I was real nervous when you threw it up to me. It caught me quite off guard and - -

Q Have you had an opportunity to calm down now?

A Yeah, I took a look at it and read the whole thing.

Q What, in your opinion, what does the term, "said additional increase," refer to? Which increase does it refer to?

A It refers to the increase directly proceding it.

THE COURT: Now, which paragraph are we speaking of there?

THE WITNESS: This is the "said additional increase" right here (indicating to the Court), and it [1477] refers to - -

THE COURT: This previous sentence?

THE WITNESS: Yes, sir.

Q Why do you say it refers to the previous sentence?

A Well, going through the entire thing, you can't feel like that you can go back up to the beginning of it and make it apply to that.

Q Why not?

A Well, it just - - the way I read it, that's the way it is. It refers to the one directly in front of it.

Q Are you saying that "said additional increase" refers to something directly in front of it, or it couldn't refer to something that precedes it in a paragraph or two in front of the sentence?

A The way I read the Bill, this "said additional increase" refers to this sentence directly in front of it. I don't believe it can refer to something back up in here.

Q Okay.

MR. BRECKENRIDGE: No further questions.

THE COURT: Well, why? That was the question.

THE WITNESS: That's just my opinion the way I read it, Your Honor, and I read it from the beginning and as it applies down through there, it has to apply to this directly - -

THE COURT: How do you isolate it to just that one paragraph, one sentence, rather?

THE WITNESS: Well, that's just my opinion.

THE COURT: Well, why didn't they put a semicolon [1478] in front of "Provided" so that it would tie in with that same previous sentence rather than making it an isolated sentence? Have you put any thought to that, grammatically?

THE WITNESS: No, sir, I - -

THE COURT: I'm not very good at grammatical things, but I was just curious.

THE WITNESS: No, sir. I really didn't. When I re-read the Bill, and I've read it before, but it just caught me off guard, and when I re-read it my thoughts came right back when I sat down and read it, and that is how I remember it, and you know, throwing it up here, it caught me off guard, but when going back over it, I can remember the sequence of thoughts that I had that this has to apply to this, not this up here.

THE COURT: Why?

THE WITNESS: It just - - to my mind, that's the way it applies. It's just - - that's just the way it is. This applies to this and not to anything else.

THE COURT: All right. How does it connect to that preceding sentence?

THE WITNESS: It just - - it follows, to me, in the logical sequence that all wells that came into production after the effective date shall be taxed at the rate of four percent of gross [1479] value oil and gas at point of production for a period of ten years after production begins, and then ten years after such production begins, such tax shall tax shall be imposed at the rate of six percent on such wells that go into production after the effective date of the Act. Provided, however, that said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the Smackover Formation. And, to me, that just applies directly back to that.

REDIRECT EXAMINATION (Continued)

BY MR. BRECKENRIDGE:

Q Mr. Easterly, how do you interpret the word "said"? Does that mean something that you're talking about, or does it mean that you refer to something that is previously mentioned?

A Well, as I stated, this phrase "said additional increase" refers to this "increase after ten years".

Q In other words, the word "said" refers to what you were just speaking about immediately preceding it?

A To what has just been said as I read it. This sentence directly in front of it.

MR. BRECKENRIDGE: No further questions.

[1480] THE COURT: Does anybody else have any questions?

MR. CROWE: I have one or two.

RECROSS-EXAMINATION

BY MR. CROWE;

Q Mr. Easterly, you say that increase refers to the preceding sentence. Is that right?
A That particular one, yes, sir.
Q In your opinion?
A Yes, sir, in my opinion.
Q Now, referring to the last sentence in paragraph 1(d) - - would you look at that? It says, "Any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied."
A Yes, sir.
Q Would that mean that only royalty owners in new wells would be entitled to an increase to be consistent with the interpretation you gave the Court?
A Run that by me again, please. I was still reading it.
Q Does that mean - - does the word "increase" in the last sentence of Paragraph (d) mean that only royalty owners under new wells would be entitled to an exemption from the increase?
A Let me just be honest with you. When I really analyzed the Bill, I look at the fiscal part of it, and this portion of "Any person who is a royalty owner shall be exempt from the payment of any increase," I really haven't done an analysis on that. I really [1481] didn't look at it just to be quite honest with you. I look at it now but - -

Q Well, my only question to you is do you know which increase they are talking about there?

A (No response from the witness.)

Q I mean, if you don't know - - -

A I didn't give it any thought, and I really didn't look at it.

Q Well, do you have any opinions as to what increase it's talking about there?

A Looking at it, it says, "The royalty owner shall be exempt from the payment of any increase in taxes levied herein and shall not be liable therefor." Just giving an opinion on that, I would hate to do it. I don't have an opinion, but can I read the whole thing? It will take me a couple of minutes to look at the whole thing.

THE COURT: Sure, take your time.

A And, again, I can't promise anything, because as I told you, I really wasn't concerned with looking at this.

Okay. Just taking a quick look at it and reading it here, "The royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefor." This refers to, I would assume a royalty owner would not be liable for increases levied whether it is by Section (d) or by the entire thing. Since it is in Section (d), and Section (d) says that it does not limit or enlarge the authority of city or county to levy taxes, licensing on there, but reading [1482] it out of context, just taking that one sentence, it says, "Shall be exempt from any increase from the payment of any taxes herein levied," and again, I didn't refer to it, so, really, I don't have an opinion without sitting down and really taking a look at it. You've asked me to hipshoot which is something I don't like to do.

Q But this statute is just hard to read, isn't it?

A Well, no, sir, not when you sit down with it, and I've

sat down and looked at it, but I haven't looked at this portion of it because I was interested, and my primary interest was in the fiscal effect to the State.

Q Well, the Department of Revenue is, I believe, charged by law with enforcing all the provisions of these. Is that not correct?

A Yes, sir.

Q Which would include the royalty, would it not, provisions of this Act?

A Yes, sir, they are charged with enforcing all of the provisions of the Act.

Q Why would you not refer the word "increase" in that last sentence of 1(d) back up to the proviso that you just discussed a minute ago?

A Why - - you mean talking about the proviso - - -

Q Which you applied to new wells.

A Applied to new wells? Again, you asked me to make an analysis of it, and I have looked at it here, and I haven't sat down and looked at it in context, the whole [1483] thing. I had read this first part of the Bill several times and I've gone over it in my mind. This is really about the first time I've looked at this because I'm not, in my division, charged with the enforcement of it.

Q So, you just don't know. Right?

A Right. To this portion.

Q Well, now, going to the caption on page one of the Act, this amends Code 40, Section 2, and 8, so as to increase the rate of tax. What does that increase refer to?

A That was an increase to six percent.

Q And it says to provide certain exemptions. What does that refer to from the increased rate?

A The exemptions, it would appear to refer to, would be this twenty-six barrel exemption from the six percent rate.

Q Would it be the new well exemption?

A The new well exemption for a ten year period you're referring to?

Q Yes.

A Yes, that would be also an exemption from the six percent rate, and looking back at it here, this one that we just referred to as an exemption, whether it's from the six percent rate of the increased county license is which is the specific one it's into, again, I have not looked at that in great detail.

Q Well, look if you would at the first sentence of Paragraph (b) of the Act. The part providing, "The tax is hereby levied upon the basis of the entire [1484] production including what is known as the royalty interest." How does that apply with respect to the last sentence of Paragraph (d)?

A Well, the language in here says it's the tax levied on the entire production in the state, including what is known as the royalty interest, on which production, and so forth, "shall be a lien," and then you're asking me to look at the last sentence in (b). Again, in regard to that - - is that what you're saying?

Q Right. Let me put it this way, - - -

A Well, let met say this. Again, really looking at these and skipping back and forth, I have a problem, because I'm doing something real fast here that I'm normally used to taking a great deal of time in pondering over. If I seem that I don't know what I'm doing - - -

Q Just take you time.

A - - you'll just have to excuse me. If I seem that I don't know what I'm doing, because it takes a great deal of time to look at these things and we're not used to making a quick hip-shoot analysis of it, and I really haven't done, you know, I really haven't done a complete analysis since the Bill passed.

Q Okay. Well, take your time.

A Looking at this, really, based on what I've seen, taking that Section 1(d) in context with that, I really don't have an opinion unless I can relate it to something else to the Bill in toto.

Q How can you levy a tax on the royalty in the first [1485] sentence of 1(d) and then exempt the royalty in the last sentence of 1(d)? Isn't that a conflict?

A No, sir, not if you look at the section that it's in. You could exempt - - you could levy a tax on a royalty interest and then in another complete retitled section exempt them from a specific license in there.

Q You see no conflict at all between the two?

A No, sir, not just sitting here.

Q All right. Look at Paragraph 1(e).

A Yes, sir.

Q Which says, "The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this Act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas."

Do you understand that?

A Yes, sir.

Q Does that apply to a two percent increase or the entire six percent tax?

A Well, this would seem to refer to - - it says, "The tax hereby levied shall be absorbed and paid for by the producer . . . .it being the express intent that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas." That seems to be the intent of the Legislature to say that the tax will [1486] be borne exclusively by the producer or severer. As I read the tax herein levied, and this entire Section 40–20–2 is the levy section. It starts off saying, "herein levied".

Q You thought that to be the six percent total. Right.

A Yes, sir, I would assume that's what it is.

Q Are you aware that the Department of Revenue con-

strued it to be only the increase?

A No, sir, I'm not. I don't know. I mean, I'm not - - I was not looking - - as I said, I haven't looked at this Bill. It says that the tax herein levied.

MR. CROWE: No further questions.

FURTHER RECROSS-EXAMINATION

BY MR. BRASWELL:

Q Mr. Easterly, when the Revenue Department analyzed this Bill to determine its fiscal impact, the Bill was analyzed in its original form, not its amended form?

A Yes, sir.

Q And are you aware that in the original form of the Bill that last provision about the Smackover Formation and 15,000 to 15,800 was not in there?

A Yes, sir, I believe that's correct.

Q And are you also aware that the royalty owner exemption which Mr. Crowe called your attention to was not in there as the Bill was originally introduced?

A If you say that. I don't have a copy of the Bill as originally introduced. And as I said, we made a fiscal [1487] analysis of how much revenue it would produce.

Q And are you aware that the provision Mr. Crowe was last calling your attention to, which we've called the pass-through prohibition, was not in the Bill as it was originally introduced?

A I don't have a copy of it as introduced, but if you - - I will accept that if you say so.

Q Now, as I understood your testimony when you got back on the stand after the recess, you said that the sentence beginning with the word "Provided" which has in it Smackover Formation and the 15,000 to 15,800 feet, qualified or modified the sentence which came immediately before it?

A Yes, sir, in my opinion.

Q And when you were speaking of the royalty owner exemption over in sub-paragraph (d), you quoted the fact that royalty owner exemption might qualify or modify the sentence immediately before it in sub-paragraph (d) dealing with the county's right to impose taxes?

A Yes, sir. As I said, that caught me cold, and I haven't really thought about it because I did not look at it until I came down here today.

Q So, a substantial factor in your reasoning is that a sentence should qualify or modify the sentence immediately before it?

A Well, taking what you said strictly - - I would have to say it depends on the entire context and the wording. Each analysis has to be made separately, and you can't [1488] go one to another.

Q It would be appropriate to read a given sentence which appears near the end of a provision as reaching all the way up to the beginning of a provision and qualifying it if the context was such as to allow for that reading, wouldn't it?

A Again, each case would have to stand, and this is, I guess, what I'm saying. I can't make a general statement as to that.

Q When you got back on the stand after the recess, were you aware that the Smackover provision had been inserted later as a brand new separate sentence which was not in the original Bill? Were you aware of that when you gave your testimony right after the recess?

A The Smackover - - -

Q The Smackover sentence?

A The depth provision?

Q Yes.

A Yes, sir, that was, I believe, the amendment we have been referring to.

Q Did you attach any significance to the fact that what the amendment did was stick in a brand new sentence at the very end of an entire provision? Do you attach any significance to that fact?

A No, sir. When I sat down and looked at it during the recess, I read this through and then decided, in my opinion, what it meant, and I did not attach any significance to it.

[1489] Q That would be - - now, that you know that fact, though, that would be an important factor to know in deciding what effect to give that final sentence that was added later at the very end of a provision which already existed? That would be important to know, wouldn't it?

A No, sir. When I looked at this, I tried to look at it as if I was looking at it cold, and I read it to see what it did, and in my opinion, I told you what I thought it did.

Q Isn't it accurate to say that it's not crystal clear in your mind what meaning this Smackover sentence has?

A No, sir. What I would like to say is, in my opinion, as I stated, that it referred to that directly in front of it, and I read the Bill from the top and that's where I go down through it and that's what I based my opinion on, and in my opinion, it referred directly to that preceding sentence with the coming on and so forth.

Q I understand that's your opinion, and I take it you are aware that many times it is necessary to express an opinion or give an interpretation on a provision which admittedly is susceptible of two different interpretations. You are aware of that situation, aren't you?

A Well, I assume someone else could have another opinion. yes, sir.

Q Yes, sir. And you would acknowledge that it would be reasonable for someone else to have the contrary opinion as to the effect of this sentence, wouldn't you?

A Well, I would assume that some people do. Yes, sir.

[1490] And that they could reasonably hold that point of view?

A Well, it's my opinion that this provision is that, I don't see - - I feel that my opinion is a correct one.

Q But you do acknowledge that reasonable minds could differ in determining the meaning of that sentence?

A Well, I assume anyone is entitled to their opinion. Yes, sir.

Q And wouldn't you go so far as to say that this provision or this statute is ambiguous?

A No, sir. It says fairly clearly that there is a specific tax rate levied.

MR. BRASWELL: That's all.

FURTHER RECROSS-EXAMINATION

BY MR. SEALE:

Q Mr. Easterly, taking the statute as a whole, you've read it, read it several times now and you've had some difficulty in applying the statute as a whole, so not just this one sentence that says, "Provided, however," sentence, but taking the statute as a whole, wouldn't you admit that the statute as a whole was somewhat ambiguous?

A Saying the statute as a whole is somewhat ambiguous - - I read it here on the stand, and I am not familiar with it - - in other words, I have not studied it in detail or at any great length. I have other duties.

Q But reading it on the stand as you said you've done, and you can't get the clear intent of the statute, can you?

[1491] A Some parts of it are clear - - -

Q And some are not?

A - - and some are not. Yes, sir.

Q So, some parts of it are somewhat ambiguous?

A Yes, sir, most legislation is. They tend to use conflictive language.

Q Mr. Crowe had asked you if you knew that the Department of Revenue was authorized and directed to enforce and administer Section 40–20 of the Code of Alabama, and you acknowledged that you are familiar with this Section.

A Again, 40–20?

Q The specific statute is 40–20–4. Are you familiar with that, sir?

A What statute - - -

Q It's the statute requiring the - - directing the Department of Revenue to administer and enforce the provvisions of this Article, being 40–20?

A Well, I don't have the Code in front of me.

Q But you are basically familiar with that statute?

A That is the enforcement statute?

Q Yes, sir.

A Yes, sir.

Q And Mr. Crowe has asked you about some of these pass-through provisions or prohibition provisions about passing through some increase, whatever increase it may have been, to royalty owners and prohibition against passing on the tax herein levied, or whatever tax that may have been, to consumers. How is the Revenue [1492] Department going to enforce those statutes?

A That is not under my jurisdiction. I strictly make an analysis, a fiscal analysis of the Bill. The enforcement provisions - - I don't enforce the Act.

Q Would you admit that it might be impossible for the Revenue Department to enforce those provisions?

A No, sir.

Q How would they enforce them?

A I don't know. As I said, that's not my job.

Q How is the Revenue Department going to know who is paying the tax?

A I don't know, sir.

MR. SEALE: I don't have any further questions of Mr. Easterly.

FURTHER RECROSS-EXAMINATION

BY MR. CROWE:

Q You mentioned a moment ago to Mr. Seale that some parts of this Act were ambiguous and some were clear. Do you have any trouble with the twenty-six barrel exemption?
A The twenty-six barrel exemption?
Q Right. That's clear, is it not?
A You're referring to the exemption that says all wells producing less than twenty-six barrels of oil per day shall be taxed at the rate of four percent?
Q Yes.
A Yes, that is what it says.
Q Okay. All wells?
A It says, all wells producing - - yes, sir, all wells [1493] producing - - -
Q At the tax rate of four percent. So, any well in this State that produces less than twenty-six barrels would be taxed only at the rate of four percent?
A Yes, sir, with the further provisos. I believe there is a provision - - let me read it back, again. That produces less than twenty-six barrels of oil per day shall be taxed at the rate of four percent.

MR. CROWE: Thank you.

THE COURT: Any others? Thank you.

MR. SEALE: Your Honor, may it please the Court, I believe at this point I would like to again make my motion for a directed verdict with respect to

my clients, Warrior Drilling and Engineering Company, Pruet Production, and Anderman, and Midroc - - strike Midroc - - Midroc is only oil production - - motion for judgment, that is, in line with what Mr. Mr. Easterly has just said in reading this, and in line with the Court's summary judgment on behalf of Terra, I think as a matter of law, at the present time we are entitled to a motion for judgment with respect to the twenty-six barrels and the four percent.

THE COURT: Granted.

MR. SEALE: Thank you, sir.

MR. WAGNON: Well, we had a witness. I'm not sure just where that granting of that motion for [1494] judgment leaves us, but I think we have some testimony just briefly that we would like to get into the record.

THE COURT: All right.

MR. WAGON: I would like to call Gerald Turner.

* * * *

PLAINTIFF'S EXHIBIT FOUR

IN THE CIRCUIT COURT OF MONTGOMERY
MONTGOMERY COUNTY, ALABAMA

EXCHANGE OIL AND GAS COMPANY, et al.,
Plaintiffs,

VS.

RALPH EAGERTON, Commissioner
of Revenue of the State of Alabama,
Defendant.

CV-79-1284-H, et al.

[Offered at Record page 1246]

H. 148 By Hines
HL 4/17/78
RFD Ways and Means

SYNOPSIS: This bill amends Code of Alabama 1975, to increase the rate of oil and gas severance tax, and provides that the increased revenue be distributed 50% to counties and municipalities and 50% to the state.

A BILL
TO BE ENTITLED
AN ACT

To amend Code of Alabama 1975, Sections 40–20–2 and 40–20–8, so as to increase the rate of tax; to provide further for distribution of the proceeds of the tax; and to provide certain exemptions from the increased rate.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Code of Alabama 1975, Section 40–20–2, is amended to read as follows:

"§ 40–20–2. (a) There is hereby levied, to be collected hereafter, as herein provided, annual privilege taxes upon every person engaging or continuing to engage within the State of Alabama in the business of producing or severing oil or gas as defined herein, from the soil or the waters, or from beneath the soil or the waters, of the state for sale, transport, storage, profit, or for use. The amount of such tax shall be measured at the rate of ~~five~~ *six* per centum of the gross value of said oil or gas at the point of production ~~until October 1, 1973, at which time the rate of such tax shall decrease to four per centum which shall be the applicable rate thereafter.~~ *All wells producing less than 26 barrels of oil per day shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production. All wells that come into production after the effective date of this Act shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production for a period of three years after such effective date. Three years after the effective date, such tax shall then be imposed at the rate of six per centum (6%) on such wells that go into production within three years after the effective date of this Act.* (b) The tax is hereby levied upon the basis of the entire production in this state, including what is known as the royalty interest, on which production the amount of such tax shall be a lien, regardless of the place of sale or to whom sold, or by whom used, or the fact that the delivery may be made to points outside the state; and the tax shall accrue at the time such oil or gas is severed from the soil or the waters, or from beneath the soil or the waters, and in its natural, unrefined, or unmanufactured condition. (c) A county, city, town or municipality of the state of Alabama shall not establish, levy,

impose or collect as a condition of doing business or otherwise, any tax, fee, license or charge, whatsoever, directly or indirectly, on or with respect to the production, treating, processing, ownership, sale, storage, purchase, marketing, or transportation on any oil or gas produced in the state of Alabama and on which severance taxes have been paid to the state of Alabama, or upon the business of producing, treating, processing, owning, selling, buying, storing, marketing or transporting such oil, or gas or upon the ownership, operation or maintenance of plants, facilities, machinery, pipe lines, gathering lines or any equipment, whatsoever, which are, or may be necessary of convenient to the production, treating, processing, ownership, storage, sale, purchase, marketing, or transportation of such oil or gas; provided, that nothing herein shall be construed to prohibit, limit or restrict a county, city, town or municipality from imposing and collecting ad valorem taxes on any property, real or personal not otherwise now exempted by law; further the limitation herein imposed upon counties, cities, towns and municipalities shall not apply to any county, city, town or municipality which does not receive a share of the severance tax under the provisions of this article. (d) Nothing contained herein shall be deemed to limit or to enlarge the authority of a county, city, town or municipality to levy taxes or licenses on oil refining facilities located therein or on the suppliers of services or goods not including oil or gas to those persons engaging in the business of producing, treating, processing, owning, selling, buying, storing, marketing or transporting such oil or gas."

Section 2. Code of Alabama 1975, Section 40–20–8, is amended to read as follows:

"§40–20–8. (a) *Sixty-Six and two thirds per centum (66–2/3%) of* the net amount of all taxes herein levied and collected by the department, after the same has been

certified into the state treasury, shall be allocated and distributed by the comptroller to the credit of the general fund of the state and to the county in which the oil or gas was produced and to the municipalities therein in the proportion set out in the following schedule: (1) Twenty-five per centum (25%) of all taxes herein levied and collected on oil and gas produced from oil or gas wells located within any county, shall be allocated and distributed to each such county for county purposes or to be expended at the discretion of the county governing body. In all counties having a population of not less than 34, 875 nor more than 36,000, according to the 1970 federal decennial census, such funds shall be allocated and distributed to the boards of education of the public schools in such counties on a pro rata basis as established by the number of children in net enrollment in the public schools during the prior school attendance year. In all counties having a population of not less than 16,000, nor more than 16,250, according to the 1970 federal decennial census, such funds shall be allocated and distributed as follows: Each year the first $150,000 shall be paid to the custodian of the county school funds and after the payment of said $150,000 each year the balance of said funds shall be divided and paid 1/3 to the custodian of the county school funds and 2/3 to the custodian of the county general funds. (2) Ten percent (10%) of all taxes herein levied and collected on oil and gas produced from oil or gas wells located within the corporate limits or the police jurisdiction of any municipality shall be allocated and distributed to each such municipality. (3) Fifty percent (50%) of the first one hundred and fifty thousand dollars ($150,000.00) remaining, or any part thereof, collected per year under the provisions of this article to the state; forty-two and one-half percent (42--1/2%) to the county; and seven and one-half percent (7--1/2%) to municipalities therein on a population basis. (4) Eighty-four per centum (84%) of all additional sums collected per year under the provisions of this article to the state; fourteen per centum

(14%) to the county; and two per centum (2%) to municipalities therein on a population basis.

"(b) Sixteen and two-thirds per centum (16–2/3%) of the net amount of all taxes herein levied and collected by the department shall be certified into the state treasury to the credit of the state General Fund.

"Sixteen and two thirds per centum (16–2/3%) of the net amount of all taxes herein levied and collected by the department on oil and gas produced from oil or gas wells located within any county, shall be allocated and distributed to each such county for county purposes to be expended at the discretion of the county governing body.

"(c) All monies paid into the general fund of the State pursuant to this section shall be kept in a separate account and expended only for the Medicaid program."

Section 3. This Act shall become effective on the first day of the second month after its passage and approval by the Governor, or its otherwise becoming a law.

House of Representatives
Date 7/12/79
Substitute Sent Senate
JOHN W. PEMBERTON, Clerk

H. 148

Committee: WAYS AND MEANS
Analyst: Victor Vernon
Sponsor: HINES
Date: 6/7/79

FISCAL NOTE

House Bill 148 as substituted and reported will increase the oil and gas production privilege tax receipts by an estimated $5,400,000 per fiscal year of which $2,700,000 would be distributed to the General Fund and $2,700,000 would be distributed to the several oil producing counties. These estimated increases in receipts are only based on current prices and do not reflect any increase in tax receipts due to full deregulation of petroleum prices.

/s/ Walter Owens
Walter Owens, Chairman
Ways and Means Committee

LFO Form 11
12/11/78

SUBSTITUTE FOR H. B. 148 By Ways and Means Committee

SYNOPSIS: This bill amends Code of Alabama 1975, to increase the rate of oil and gas severance tax, and provides that the increased revenue be distributed 50% to counties and municipalities and 50% to the state.

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AN ACT

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effective date of this Act shall be taxed at the rate of four per centum (4%) of the gross value of said oil or gas at the point of production for a period of ten years after production begins. Ten years after production begins, such tax shall then be imposed at the rate of six per centum (6%) on such wells that go into production after the effective date of this Act. Provided, however, that said additional increase shall be limited to those oil and gas wells from between 15,000 and 15,800 feet in the smackover formation. (b) The tax is hereby levied upon the basis of the entire production in this state, including what is known as the royalty interest, on which production the amount of such tax shall be a lien, regardless of the place of sale or to whom sold, or by whom used, or the fact that the delivery may be made to points outside the state; and the tax shall accrue at the time such oil or gas is severed from the soil or the waters, or from beneath the soil or the waters, and in its natural, unrefined, or unmanufactured condition. (c) A county, city, town or municipality of the state of Alabama shall not establish, levy, impose or collect as a condition of doing business or otherwise, any tax, fee, license or charge, whatsoever, directly or indirectly, on or with respect to the production, treating, processing, ownership, sale, storage, purchase, marketing, or transportation on any oil or gas produced in the state of Alabama and on which severance taxes have been paid to the state of Alabama, or upon the business of producing, treating, processing, owning, selling, buying, storing, marketing or transporting such oil, or gas or upon the ownership, operation or maintenance of plants, facilities, machinery, pipe lines, gathering lines or any equipment, whatsoever, which are, or may be necessary or convenient to the production, treating, processing, ownership, storage, sale, purchase, marketing, or transportation of such oil or gas; provided, that nothing herein shall be construed to prohibit, limit or restrict a county, city, town or municipality from imposing and collecting ad valorem taxes on any property, real or personal not otherwise now exempted by

law; further, the limitation herein imposed upon counties, cities, towns and municipalities shall not apply to any county, city, town or municipality which does not receive a share of the severance tax under the provisions of this article. (d) Nothing contained herein shall be deemed to limit or to enlarge the authority of a county, city, town or municipality to levy taxes or licenses on oil refining facilities located therein or on the suppliers of services or goods not including oil or gas to those persons engaging in the business of producing, treating, processing, owning, selling, buying, storing, marketing or transporting such oil or gas. *Any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefor. (e) The privilege tax herein levied shall be absorded and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.*"

Section 2. Code Alabama 1975, Section 40–20–8, is amended to read as follows:

"§ 40–20–8. (a) *Sixty-six and two-thirds per centum (66–2/3%)* of the net amount of all taxes herein levied and collected by the department, after the same has been certified into the state treasury, shall be allocated and distributed by the comptroller to the credit of the general fund of the state and to the county in which the oil or gas was produced and to the municipalities therein in the proportion set out in the following schedule: (1) Twenty-five per centum (25%) of all taxes herein levied and collected on oil and gas produced from oil or gas wells located within any county, shall be allocated and distributed to each such county for county purposes or to be expended at the discretion of the county governing body. In all counties having

a population of not less than 34, 875, nor more than 36,000, according to the 1970 federal decennial census, such funds shall be allocated and distributed to the boards of education of the public schools in such counties on a pro rata basis as established by the number of children in net enrollment in the public schools during the prior school attandance year. In all counties having a population of not less than 16,000, nor more than 16,250, according to the 1970 federal decennial census, such funds shall be allocated and distributed as follows: Each year the first $150,000 shall be paid to the custodian of the county school funds and after the payment of said $150,000 each year the balance of said funds shall be divided and paid 1/3 to the custodian of the county school funds and 2/3 to the custodian of the county general funds. (2) Ten percent (10%) of all taxes herein levied and collected on oil and gas produced from oil or gas wells located within the corporate limits or the police jurisdiction of any municipality shall be allocated and distributed to each such municipality. (3) Fifty percent (50%) of the first one hundred and fifty thousand dollars ($150,000.00) remaining, or any part thereof, collected per year under the provisions of this article to the state; forty-two and one-half percent (42–1/2%) to the county; and seven and one-half percent (7–1/2%) to municipalities therein on a population basis. (4) Eighty-four per centum (84%) of all additional sums collected per year under the provisions of this article to the state; fourteen per centum (14%) to the county; and two per centum (2%) to municipalities therein on a population basis.

"(b) Sixteen and two-thirds per centum (16–2/3%) of the net amount of all taxes herein levied and collected by the department shall be certified into the state treasury to the credit of the state General Fund.

"Sixteen and two-thirds per centum (16–2/3%) of the net amount of all taxes herein levied and collected by the depart-

ment on oil and gas produced from oil or gas wells located within any county, shall be allocated and distributed to each such county for county purposes to be expended at the discretion of the county governing body.

Section 3. This Act shall become effective on the first day of the second month after its passage and approval by the Governor, or its otherwise becoming a law.

House of Representatives
DATE 7-12-79
ADOPTED
Yeas: 67 Nays: 1
JOHN W. PENBERTON, Clerk

79-434
July 23, 1979
Received Secretary of State

Committee: FINANCE AND TAXATION
Analyst: Victor Vernon
Sponsor: HINES
Date: 7-17-79

FISCAL NOTE

House Bill 148 as reported by the Finance and Taxation Committee will increase the oil and gas production privilege tax receipts by an estimated $1,730,000 per fiscal year of which $865,000 would be distributed to the General Fund and $865,000 would be distributed to certain oil producing counties. These estimated increases in receipts are only based on current prices and do not reflect any increase in tax receipts due to full deregulation of petroleum prices.

/s/ J. Richmond Pearson
J. Richmond Pearson, Chairman
Finance and Taxation Committee

LFO Form 11
12/11/78

No. 613
Received
July 19, 1979
Time 11:40 P.M.
Governor's Office

Amendment to Substitute H. B. 148

Amend Substitute H. B. 148 as follows:

In Section 3, page 5, line 21, insert the following language in lieu thereof and renumber the subsequent sections:

Section 3. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Concurr [sic]
House of Representatives
Date 7-19-79
ADOPTED
Yeas: 56 Nays: 0
JOHN W. PEMBERTON, Clerk

Senate 7-19 1979
ADOPTED
Yeas: 21 Nays: 0
McDOWELL LEE, Secretary

SENATE 7-18 19 79

H.F. FAV R. 2 Cal.

7/19/79 Rd 3 at length and passed as amended
Yeas 67 Nays 27
McDOWELL LEE
Secretary
3 abstain

HOUSE OF REPRESENTATIVES
R. 3 at length and passed
Yeas 54 Nays 0
Date 7-19-79
as amended by senate
JOHN W. PEMBERTON, Clerk

HB 148

HOUSE OF REPRESENTATIVES

R. 3 ... th and passed

Yeas 64 Nays

Date 6-7-12-79

JOHN W. PEINDERTON, Clerk

SENATE 7-12-79

RD. 1 ... F, T

HOUSE OF

R. ...

Date 4/12/79

JOHN W. PEINDERTON, Clerk

This bill was referred to the Standing Committee of the Senate on

Finance + Taxation

and was acted upon by said Committee in session and is by order of the Committee returned therefrom with favorable report

this 18 day of April, 19 79

Chairman

REPORT OF STANDING COMMITTEE

This bill having been referred by the House to its standing committee on Ways and Means was acted upon by such a committee in session, and returned therefrom to the House with the recommendation that it be Passed. as Amended

This 6 day of June, 19 79

Walter Owens, Chairman

HOUSE OF REPRESENTATIVES

R. 2 - Rld. Cal.

Date 6-7-79

JOHN W. PE...

PLAINTIFF'S EXHIBIT SEVEN

[Offered At Record page 1254]

State of Alabama
LEGISLATIVE FISCAL OFFICE
Room 7 - State Capitol
Montgomery 36130

August 30, 1979

REX McDowell
Director
Telephone
Area Code 205
832-3996 ACTS 345-3996

MEMORANDUM

TO: Rex
From: Victor
RE: Fiscal Notes to H. B. 148

The fiscal note to House Bill 148 as introduced carried an estimate of $5.4 million in additional tax revenue, as the bill affected all in-state wells producing more than (26) barrels of oil per day.

This estimate remained in the fiscal note of House Bill 148 from June 6, 1979 until July 17, 1979, after being reported out of the Senate Finance and Taxation Committee. The estimate was changed to reflect an interpretation of House Bill 148 as substituted affecting only Escambia County's production of oil and gas.

The note was then changed upon contacting officers of the Department of Revenue who had accepted the Escambia County interpretation as the intent of the bill.

VV/pb

PLAINTIFF'S EXHIBIT EIGHT
[Offered At Record page 1256]

STATE OIL AND GAS BOARD
Ralph W. Adams, Chairman
Troy
David Mathews, Member
University
Gaines McCorquodale, Member
Jackson

P.O. Drawer O
University Alabama 35486
Phone (205) 349–2852
Thomas J. Joiner
Supervisor
Ken P. Hanby
Assistant Superviosr
Technical Staff
Petroleum Engineers
Richard N. Raymond
H. Gene White PE
Petroleum Geologist
Jay Masingill
Phill Meadows
Administrative Sources
George W. Swindel, Jr.
Legal Staff
Attorneys
A. Charles Freeman
James H. Giggs

Honorable Brooks Hines
Representative from 91st District
House of Representatives
218 Belleville Avenue
Brewton, Alabama 36426

Dear Brooks:

This letter is in response to our telephone conversation of March 20, 1979.

Dr. John L. Jernigan is the only constituent of the three you mentioned in our conversation who is not included on the Board's subscription list at the present time. Mack Lovelace is a subscriber, but his subscription was to be renewed during March 1979, and Jim Hart, Jr. renewed his subscription during February 1979 for another year. I have contacted each of these individuals by phone to inform them that in the future they will begin receiving the Board's NOTICE OF MEETING, RESULT OF MEETING AND ACTIVITY AND PRODUCTION REPORTS free of charge Dr. Jernigan and Mack Lovelace will be placed on the Board's mailing list effective May1, 1979. The renewal fee paid by Jim Hart, Jr. in February could be returned but Jim has agreed to let his present subscription expire. Following this expiration Jim will be placed on the Board's mailing list to receive this information free of charge.

Oil, gas and condensate production during 1978 for Escambia County and the State is a follows:

Escambia County Total
Oil
(barrels)
3,289,011
CONDENSATE
(barrels)
3,901,950
GAS
(Mcf)
56,857,970

State Total
Oil
(Barrels)
11,441,015
CONDENSATE
(barrels)
8,383,280
GAS
(Mcf)
90,514,650

Production from Escambia County during 1978 accounted for 29% of the crude oil, 47% of the condensate and 63% of the gas produced in Alabama. Of the gas that is marketable from the produced volumes in Escambia County, approximately 50% is transported by intrastate pipelines and 50% by interstate pipelines. Statewide, approximately 82% of the gas produced in Alabama is transported by intrastate pipelines and 18% by interstate pipelines. The disposition of oil and condensate is difficult to determine, however, the majority is probably transported to refineries outside the State of Alabama. You might also be interested to know that production from the Flomaton and Big Escambia Creek plants accounts for 42% of the gasoline, 49% of the butane, 57% of the propane and 88% of the sulfur produced in Alabama.

If you need any additional information, please let us know.

Sincerely,
/s/ Richard N. Raymond
Richard N. Raymond
Petroleum Engineer

RNR:ath
xc: T. J. Joiner
Ken Hanby
Jim Griggs

PLAINTIFF' EXHIBIT 27
[Offered At Record page 1273]

Rep. Brooks Hines
Enclosed is a substitute to H 148
He wants two substitutes to the Substitute to 148.

1. Make the increase of 2% phase out in 1983.

2 limit the increase to those oil and gas wells from between 15,000 and 15,800 ft(?) in the smackover formation.

Then also prepare him amendments (2) amending the Substitute to H 148 doing the same thing.

No. 81-1020

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

EXXON CORPORATION, GULF OIL CORPORATION
AND
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Appellants,

v.

RALPH EAGERTON, JR., as Commissioner of
Revenue of the State of Alabama, et al.,
Appellees.

On Appeal From the Supreme Court
of the State of Alabama

PROOF OF SERVICE

I, LOUIS E. BRASWELL, one of the attorney for Exxon Corporation, Gulf Oil Corporation a :d The Louisiana Land and Exploration Company, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of July, 1982, I served copies of the foregoing Joint Appendix on all parties required to be served as follows:

1. On appellee herein, Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, by depositing a copy in a United States post office, with first class postage prepaid, addressed to John J. Breckenridge, his counsel of record, at 201 Administrative Building, Montgomery, Alabama 36130.

2. On all other parties to the proceeding below, by depositing copies in a United States post office, with first class postage prepaid, addressed to their respective attorneys of record, as follows:

To Rae M. Crowe, Esq., Attorney for Exchange Oil and Gas Corporation, Getty Oil Company, Placid OilCompany, Terra Resources, Inc., and Union Oil Company of California,
1101 Merchants National Bank Building
Post Office Box 290
Mobile, Alabama 36601;

To Euel A. Screws, Jr., Esq., Attorney for Exchange Oil and Gas Corporation, Getty Oil Company, Placid Oil Company, Terra Resources, Inc., and Union Oil Company of California,
Post Office Box 347
Montgomery, Alabama 36101;

To Robert C. Black, Esq., Attorney for Citmoco Services, Inc.,
Hill Building
Montgomery, Alabama 36104;

To James R. Seale, Esq., Attorney for Anderman Operating Company, Midroc Operating Company, Pruet Production Company, and Warrior Drilling and Engineering Company, Inc.,
Post Office Box 2069
Montgomery, Alabama 36103;

To Macbeth Wagnon, Jr., Esq., Attorney for Alabama Gas Corporation and Alagasco Pipeline Company,
1500 Brown-Marx Building
Birmingham, Alabama 35203;

To L. Murray Alley, Esq., Attorney for Southern Natural Gas Company,
1900 First National-Southern Natural Building
Birmingham, Alabama 35203;

To Edward S. Allen, Esq., Attorney for Coronado Transmission Company,
Post Office Box 306
Birmingham, Alabama 35201;

To Porter, Gonzalez & Rogers, Attorneys for Petroleum Corporation of Texas,
1800 Guaranty Bank Plaza
Corpus Christi, Texas 78475.

3. On Amici United States of America and The Federal Regulatory Commission as follows :

To Rex E. Lee
Solicitor General
Department of Justice
Washington, D. C. 20530

To A. Karen Hill
Attorney
Federal Energy Regulatory Commission
Washington, D. C. 20426

Louis E. Braswell, Jr.

LOUIS E. BRASWELL
Attorney for Exxon Corporation
Gulf Oil Corporation and The
Louisiana Land and Exploration
Company

OF COUNSEL:

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Post Office Box 123
Mobile, Alabama 36601

(205) 432-5511

No. 81-1268

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

EXXON CORPORATION, GULF OIL CORPORATION AND THE LOUISIANA LAND AND EXPLORATION COMPANY,

Appellants,

v.

RALPH EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, et al.,

Appellees.

On Appeal From the Supreme Court
of the State of Alabama

PROOF OF SERVICE

I, RAE E. CROWE, one of the attorneys for Exchange Oil and Gas Corporation, Getty Oil Company, Placid Oil Company, Terra Resources, Inc., and Union Oil Company of California, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of July, 1982, I served copies of the foregoing Joint Appendix on all parties required to be served, as follows:

1. On appellee herein, Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, by depositing a copy in a United States post office, with first class postage prepaid, addressed to John J. Breckenridge, his counsel of record, at 201 Administrative Building, Montgomery, Alabama 36130.

2. On all other parties to the proceeding below, by depositing copies in a United States post office, with first class postage prepaid, addressed to their respective attorneys of record, as follows:

To Louis E. Braswell, Esq., Attorney for Exxon Corporation Gulf Oil Corporation and The Louisiana Land and Exploration Company,
Post Office Box 123
Mobile, Alabama 36601;

To Euel A. Screws, Jr., Esq., Attorney for Exchange Oil and Gas Corporation, Getty Oil Company, Placid Oil Company, Terra Resources, Inc., and Union Oil Company of California.
Post Office Box 347
Montgomery, Alabama 36101;

To Robert C. Black, Esq., Attorney for Citmoco Services, Inc.,
Hill Building
Montgomery, Alabama 36104;

To James R. Seale, Esq., Attorney for Anderman Operating Company, Midroc Operating Company, Pruet Production Company, and Warrior Drilling and Engineering Company, Inc.,
Post Office Box 2069
Montgomery, Alabama 36103;

To Macbeth Wagnon, Jr., Esq., Attorney for Alabama Gas Corporation and Alagasco Pipeline Company,
1500 Brown-Marx Building
Birmingham, Alabama 35203;

To L. Murray Alley, Esq., Attorney for Southern Natural Gas Company,

To Edward S. Allen, Esq., Attorney for Coronado Transmission Company,
Post Office Box 306
Birmingham, Alabama 35201;

To Porter, Gonzalez & Rogers, Attorney for Petroleum Corporation of Texas,
1800 Guaranty Bank Plaza
Corpus Christi, Texas 78475.

3. On Amici United States of America and The Federal Regulatory Commission as follows:

To Rex E. Lee
Solicitor General
Department of Justice
Washington, D. C. 20530

To A. Karen Hill
Attorney
Federal Energy Regulatory Commission
Washington, D. C. 20426

Rae E. Crowe

RAE E. CROWE
Attorney for Exchange Oil and Gas Corporation, Getty Oil Company, Placid Oil Company, Terra Resources Inc., and Union Oil Company of California

OF COUNSEL:

ARMBRECHT, JACKSON, DeMOUY,
CROWE, HOLMES & REEVES
Post Office Box 290
Mobile, Alabama 36601

(205) 432-6751

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
FEB 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EXXON CORPORATION, GULF OIL CORPORATION
AND
THE LOUISIANA LAND AND EXPLORATION COMPANY,

Appellants,

versus

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, et al.

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

MOTION TO DISMISS APPEAL

Counsel of Record:
John J. Breckenridge, Jr.
201 Administrative Bldg.
Montgomery, AL 36130
Telephone:
(205) 832-5640

Of Counsel:
Charles A. Graddick
Herbert I. Burson, Jr.
201 Administrative Bldg.
Montgomery, AL 36130
Telephone:
(205) 832-5640

COUNSEL FOR APPELLEE

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No. 81-1020

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

EXXON CORPORATION, GULF OIL CORPORATION AND THE LOUISIANA LAND AND EXPLORATION COMPANY,

Appellants,

v.

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

May it please the Court:

The Appellee Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, hereby moves pursuant to Rule 16 of the Rules of the United States Supreme Court that the appeal in this present cause as filed by the Appellants Exxon Corporation, Gulf Oil Corporation and the Louisiana Land and Exploration Company be dismissed.

I. Grounds for Motion to Dismiss Appeal

Appellee's Motion to Dismiss is based upon the following grounds:

A. LACK OF JURISDICTION

On page 1 of the Appellants' Jurisdictional Statement, the Appellants have alleged that "This Court's jurisdiction over this appeal is conferred by 28 U.S.C. §1257(2)." Title 28, *United States Code* §1257 provides in pertinent part as follows:

> "Final Judgments or Decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The Appellee Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama states that the decision of the Supreme Court of Alabama from which the Appellants have attempted to take this appeal, is not a "final judgment or decree" rendered by the Supreme Court of Alabama. As can be determined from a reading of the Judgment of the Supreme Court of Alabama which the Appellants are asking this Court to review, the cause was *reversed and remanded* to the Circuit Court of Montgomery County, Alabama for further proceedings. (Page 15a Appellants Appendices attached to their Jurisdictional Statement). On remand, the Circuit Court of Montgomery County, Alabama entered a *Final Opinion and Judgment* dated September 30, 1981. (Appellee's Appendix A, page 1a). On November 2, 1981 the Appellee Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama filed a *Notice of Appeal* to the Supreme Court of Alabama from the *Final Opinion and Judgment* of the Circuit Court of

Montgomery County, Alabama dated September 30, 1981. (Appellee's Appendix B, page 1b). The Clerk of the Supreme Court of Alabama notified the Appellee Ralph P. Eagerton, Jr., that his appeal was docketed in the Supreme Court of Alabama on November 10, 1981. (Appellee's Appendix C, page 1c). On November 12, 1981, some of the parties in the Supreme Court of the State of Alabama filed their *Notice of Appeal* in the Supreme Court of Alabama. (Appellee's Appendix D, page 1d). On December 1, 1981, the Clerk of the Supreme Court of Alabama notified those Appellant Oil Companies in the Supreme Court of Alabama that their appeal had been docketed. (Appellee's Appendix E, page 1e). The appeal of Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama and the cross appeal of some of the Appellant Oil Companies is presently before the Supreme Court of Alabama and has not yet been submitted for a final disposition by the Supreme Court of Alabama. Therefore, the Appellee, Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, submits that the judgment appealed from by the Appellants in the present action is not a "final judgment or decree" as required by Title 28 U.S.C. §1257(2) and as alleged by the Appellants in the present action, and therefore this Court lacks jurisdiction to entertain said appeal. Thus, the Appellee Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama submits that the appeal by the Appellants Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company is due to be dismissed for lack of jursidiction.

B. FAILURE TO COMPLY WITH RULES OF THE UNITED STATES SUPREME COURT

Rule 12.1 of the Rules of the United States Supreme

Court requires that the Appellants at the time of docketing their appeal must file forty copies of the jurisdictional statement, "which shall comply in *all* respects with Rule 15." (Emphasis added.)

Rule 15, which outlines the items which must be included in a Jurisdictional Statement requires at subsection .1(j)(i) that the appendix to the jurisdictional statement shall contain "copies of any opinions, orders, findings of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon *the rendering of the judgment* or decree by the court whose decision is sought to be reviewed." (Emphasis added.) Since the decision from which the Appellants in the present action are appealing was remanded to the Circuit Court of Montgomery County, Alabama for further deliberation and action, *and was not rendered* by the Supreme Court of the State of Alabama, the alleged jurisdictional statement filed by the Appellants is not complete as required by Rule 15 of the Rules of the United States Supreme Court. Rule 15.2 of the Rules of the United States Supreme Court provides: "The jurisdictional statement shall be produced in conformity with Rule 33. The Clerk shall not accept any jurisdictional statement that does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 46." The Appellants in the present action are not proceeding *in forma pauperis* and since their jurisdictional statement does not include a required copy of an opinion issued by the Supreme Court of the State of Alabama *rendering a judgment*, the jurisdictional statement is not complete. Therefore, the Appellee Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama submits that since there was no rendition of a judgment by the highest court of the State of Alabama and since

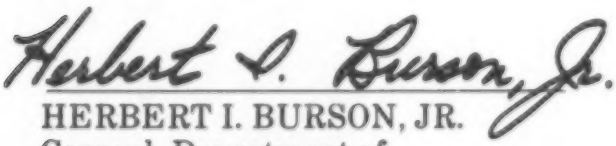
the Appellants have failed to comply with the Rules of the United States Supreme Court, this appeal is due to be dismissed.

II. CONCLUSION

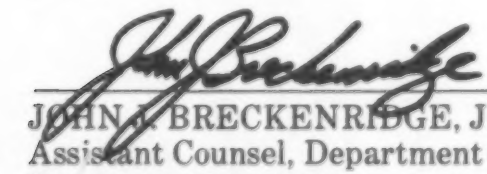
Appellee Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama hereby moves this Honorable Court, in view of the foregoing grounds presented herein, to grant his Motion to Dismiss this appeal for lack of jurisdiction, and for failure of the Appellants to comply with the Rules of this Honorable Court.

Respectfully submitted,

CHARLES A. GRADDICK
Attorney General
State of Alabama



HERBERT I. BURSON, JR.
Counsel, Department of
Revenue and Assistant
Attorney General
State of Alabama



JOHN J. BRECKENRIDGE, JR.
Assistant Counsel, Department of
Revenue and Assistant
Attorney General

State of Alabama
201 Administrative Building
Montgomery, Alabama 36130

COUNSEL FOR APPELLEE

No. 81-1020

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

EXXON CORPORATION,
GULF OIL CORPORATION
AND THE LOUISIANA LAND
AND EXPLORATION COMPANY,
Appellants,

v.

RALPH P. EAGERTON, JR., as Commissioner
of Revenue of the State of Alabama,
Appellee.

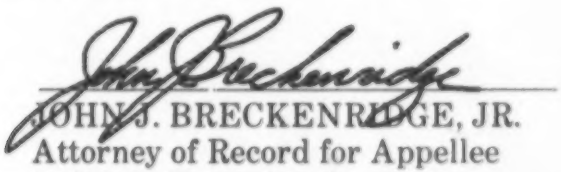
PROOF OF SERVICE

I, John J. Breckenridge, a Member of the Bar of the Supreme Court of The United States, and one of the attorneys for the Appellee Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama hereby certify that on the fifth day of February, 1982, I served copies of the foregoing Motion to Dismiss on all parties required to be served as follows: on Appellants herein, Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company, by depositing a copy in the United States Mail, with first-class postage prepaid, addressed to:

To C.B. Arendall, Jr., Esquire
Attorney for Exxon Corporation, Gulf Oil Corpor-

ation and The Louisiana Land and Exploration Company
P.O. Box 123
Mobile, Alabama 36601;

To Louis E. Braswell, Esquire
Attorney for Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company
P.O. Box 123
Mobile, Alabama 36601



JOHN J. BRECKENRIDGE, JR.
Attorney of Record for Appellee
Ralph P. Eagerton, Jr., as
Commissioner of Revenue of the
State of Alabama
201 Administrative Building
Montgomery, Alabama 36130
Telephone: (205) 832-5640

No. 81-1020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EXXON CORPORATION, GULF OIL CORPORATION
AND
THE LOUISIANA LAND AND EXPLORATION COMPANY,

Appellants,

versus

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, et al.

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALABAMA

APPENDICES

Counsel of Record:

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Of Counsel:

Charles A. Graddick
Herbert I. Burson, Jr.
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(205) 832-5640

COUNSEL FOR APPELLEE

APPENDIX A
IN THE FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA
IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

EXCHANGE OIL AND GAS CORPORATION, a corporation, Plaintiff,	)	Civil Action Nos. CV-79-1284-H
vs.	)	CV-80-224-H, CV-80-568-H,
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, Defendant.	)	CV-80-889
CITMOCO SERVICES, INC., a corporation Plaintiff,	)	
vs.	)	Civil Action Nos. CV-79-1338-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, Defendant.	)	

EXXON CORPORATION, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1529,
vs.	)	CV-80-121,
	)	CV-80-421
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-863-H
Defendant.	)	
GETTY OIL COMPANY, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1363-H
vs.	)	CV-80-226-H
	)	CV-80-565-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-886-H
Defendant.	)	
WARRIOR DRILLING AND ENGINEERING CO., INC., a corporation,	)	
	)	Civil Action Nos.
vs.	)	CV-79-1509-H
	)	CV-80-166-H
RALPH P. EAGERTON, JR., as Commissioner	)	CV-80-520-H
	)	CV-80-783-H

of Revenue of the State of Alabama, Defendant.	)	
GULF OIL CORPORATION, a corporation Plaintiff, vs.	)	Civil Action Nos. CV-79-1622 CV-80-509
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, Defendant.	)	
THE LOUISIANA LAND AND EXPLORATION COMPANY, a corporation Plaintiff, vs.	)	Civil Action Nos. CV-80-006, CV-80-351
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, Defendant.	)	
MIDROC OPERATING COMPANY, a corporation	)	

Plaintiff,	)	Civil Action Nos.
	)	CV-80-168-H
vs.	)	CV-80-517-H
	)	CV-80-781-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	
PLACID OIL COMPANY, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-80-074-H
vs.	)	CV-80-229-H
	)	CV-80-567-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-887-H
Defendant.	)	
UNION OIL COMPANY OF CALIFORNIA, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1383-H
vs.	)	CV-80-225-H
	)	CV-80-566-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the	)	CV-80-888-H

State of Alabama,	)	
	)	
Defendant.	)	
PETROLEUM CORPORATION OF TEXAS, a corporation,	)	
	)	
	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1397-H
	)	CV-80-228-H
vs.	)	CV-80-569-H
	)	CV-80-885-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
	)	
	)	
	)	
	)	
Defendant.	)	
PRUET PRODUCTION CO., a corporation,	)	
	)	
	)	Civil Action Nos.
vs.	)	CV-79-1508-H
	)	CV-80-165-H
RALPH P. EAGERTON,	)	CV-80-519-H
JR., as Commissioner	)	CV-80-780-H
of Revenue of the	)	
State of Alabama,	)	
	)	
	)	
Defendant.	)	
TERRA RESOURCES, INC., a corporation,	)	
	)	
	)	
Plaintiff,	)	Civil Action Nos.

	)	CV-79-1362-H
vs.	)	CV-80-227-H
	)	CV-80-564-H
RALPH P. EAGERTON,	)	CV-80-890-H
JR., as Commissioner	)	
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	
ANDERMAN OPERATING	)	
CO., a corporation,	)	
	)	Civil Action Nos.
vs.	)	CV-79-1510-H
	)	CV-80-167-H
RALPH P. EAGERTON,	)	CV-80-518-H
JR., as Commissioner	)	CV-080-782-H
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	

FINAL OPINION AND JUDGMENT

This cause having come on for hearing before this Court on remand from the Supreme Court of Alabama and this Court having fully read and considered the opinion of the Supreme Court of Alabama entered herein on July 10, 1981 in *Eagerton v. Exchange Oil and Gas Corporation*, a rehearing thereon having been denied on September 4, 1981, the Court finds and orders as follows:

1. Under the opinion and mandate of the Supreme

Court in *Eagerton v. Exchange Oil and Gas Corporation* all orders of this Court regarding the construction and unconstitutionality of Act 79-434 should be withdrawn and vacated, except as to the findings and decrees of this Court with respect to Plaintiff's application and claim for taxation at the rate of 4% on all wells producing less than 26 barrels of oil per day based on the gross value of the oil and gas of those wells at the point of production.

2. The portion of Paragraph 1(a) of Act 79-434 which provided that "all wells producing less than 26 barrels of oil per day shall be taxed at the rate of four percent (4%) on the said value of said *oil* and *gas* at the point of production" taxes all wells which produce less than 26 barrels of oil per day at the rate of 4%. This language applies to wells producing either oil or gas and taxes their production at the 4% rate under the plain and unambiguous meaning of the language. If the legislature had intended to restrict the language only to oil wells, it would have made this provision applicable to "All *oil* wells" and would not have taxed production at the rate of 4% on the value of either "oil or gas at the point of production." Furthermore, in every instance, Act 79-434 makes reference to "oil and gas" except in the instance of taxing wells which produce less than 26 barrels of *oil* per day. In *Town of Loxley v. Rositin Water, Sewer and Fire Protection Authority, Inc.*, 376 So.2d 705 (Ala. 1979) the Supreme Court held that "...while specific language used by the legislature is subject to explanation, such language cannot be detracted from or added to." The plain meaning of this language must prevail because "when the intent of the legislature can be determined from the language of the statute itself, we need not resort to extraneous matters to determine the legislative intent." *Eagerton v. Exchange Oil and Gas Corporation*, 15 ABR 1796, at 1802.

"Courts can only learn what [the] legislature intended by what it has said, and have no right to stray into mazes of conjecture or search for an imaginary purpose in [construing] the statutes." *Alabama Industrial Bank v. State ex Rel Avinger*, 286 Ala. 59, 237 So.2d 108 (1970). Thus, all wells which produce less than 26 barrels of oil as that term is defined by §40-20-1(4) Code of Alabama 1975 are taxed at the rate of 4% under Act. 79-434.

NOW THEREFORE, it is further ORDERED, ADJUDGED and DECREED by the Court that this Court's opinion and order of June 12, 1980, as amended by this Court's final judgment and decree on June 30, 1980, July 22, 1980, and July 28, 1980, are hereby withdrawn and vacated, EXCEPTING, and only excepting such portions, findings and decrees contained therein with respect to Plaintiff's application and claim for taxation at the rate of 4% under the provisions of §1(a) of Act 79-434 which provides as follows:

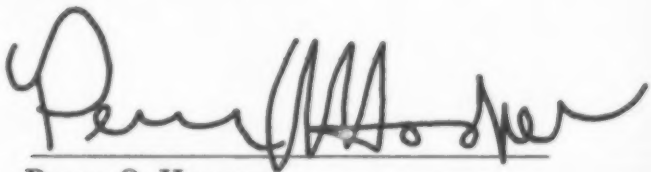
> "All wells producing less than 26 barrels of oil per day shall be taxed at the rate of four percent (4%) on the said value of said *oil* and *gas* at the point of production."

and it is further ORDERED, ADJUDGED and DECREED by the Court that §1(a) of Act 79-434 taxes all wells which produce less than 26 barrels of oil per day at the rate of 4% of the value of oil and gas at the point of production;
and it is further ORDERED, ADJUDGED and DECREED by the Court that Plaintiff, Terra Resources, Inc., is due and entitled to be refunded by the Defendant the sum of $276,508.53; that Plaintiff, Petroleum Corporation of Texas is due and entitled to be refunded the sum of $7,700.24; that Plaintiff, Pruet Production Company

is due and entitled to be refunded the sum of $51,548.31; that Plaintiff, Warrior Drilling and Engineering Co., Inc. is due and entitled to be refunded the sum of $51,951.67; and that Plaintiff Anderman Operating Co. is due and entitled to be refunded the sum of $10,987.81 in accordance with §40-1-11 and §40-1-12, Code of Alabama 1975.

Costs of Court are hereby taxed in favor of the Defendant in all cases and against the individual oil company plaintiffs in their respective cases, for which execution may issue.

Done this the 30th day of January, 1982.



Perry O. Hooper
Circuit Judge

Appendix B

NOTICE OF APPEAL TO THE SUPREME COURT OF ALABAMA

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

IN THE FIFTEENTH JUDICIAL CIRCUIT

EXCHANGE OIL AND GAS CORPORATION, a corporation, Plaintiff,	)	Civil Action Nos. CV-79-1284-H
vs.	)	CV-80-224-H, CV-80-568-H,
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, Defendant.	)	CV-80-889
CITMOCO SERVICES, INC., a corporation Plaintiff,	)	
vs.	)	Civil Action Nos. CV-79-1338-H
RALPH P. EAGERTON, JR., as Commissioner	)	

of Revenue of the State of Alabama, Defendant.	)	
EXXON CORPORATION, a corporation, Plaintiff, vs. RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, Defendant.	)	Civil Action Nos. CV-79-1529, CV-80-121, CV-80-421 CV-80-863-H
GETTY OIL COMPANY, a corporation, Plaintiff, vs. RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, Defendant.	)	Civil Action Nos. CV-79-1363-H CV-80-226-H CV-80-565-H CV-80-886-H
WARRIOR DRILLING AND ENGINEERING CO., INC., a corporation,	)	

	)	Civil Action Nos.
vs.	)	CV-79-1509-H
	)	CV-80-166-H
RALPH P. EAGERTON,	)	CV-80-520-H
JR., as Commissioner	)	CV-80-783-H
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	
GULF OIL CORPORA-	)	
TION, a corporation	)	
	)	
Plaintiff,	)	
	)	Civil Action Nos.
vs.	)	CV-79-1622
	)	CV-80-509
RALPH P. EAGERTON,	)	
JR., as Commissioner	)	
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	
THE LOUISIANA LAND	)	
AND EXPLORATION	)	
COMPANY, a corporation	)	
	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-80-006,
vs.	)	CV-80-351
	)	
RALPH P. EAGERTON,	)	
JR., as Commissioner	)	
of Revenue of the	)	
State of Alabama,	)	

Defendant.	)	
MIDROC OPERATING COMPANY, a corporation	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-80-168-H
vs.	)	CV-80-517-H
	)	CV-80-781-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	
PLACID OIL COMPANY, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-80-074-H
vs.	)	CV-80-229-H
	)	CV-80-567-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-887-H
Defendant.	)	
UNION OIL COMPANY OF CALIFORNIA, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1383-H

vs.	)	CV-80-225-H
	)	CV-80-566-H
RALPH P. EAGERTON,	)	CV-80-888-H
JR., as Commissioner	)	
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	
PETROLEUM CORPOR-	)	
ATION OF TEXAS,	)	
a corporation,	)	
	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1397-H
	)	CV-80-228-H
vs.	)	CV-80-569-H
	)	CV-80-885-H
RALPH P. EAGERTON,	)	
JR., as Commissioner	)	
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	
PRUET PRODUCTION	)	
CO., a corporation,	)	
	)	Civil Action Nos.
vs.	)	CV-79-1508-H
	)	CV-80-165-H
RALPH P. EAGERTON,	)	CV-80-519-H
JR., as Commissioner	)	CV-80-780-H
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	

TERRA RESOURCES, INC., a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1362-H
vs.	)	CV-80-227-H
	)	CV-80-564-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-890-H
Defendant.	)	
ANDERMAN OPERATING CO., a corporation,	)	
	)	Civil Action Nos.
vs.	)	CV-79-1510-H
	)	CV-80-167-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-518-H
	)	CV-080-782-H
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama appeals to the Supreme Court of Alabama from the Final Judgment of the Circuit Court of Montgomery County, Alabama, in the Fifteenth Judicial Circuit, Honorable Circuit Judge Perry Hooper, presiding, en-

tered in the above-consolidated causes holding Act 79-434, *Acts of Alabama* 1979 Regular Session, unconstitutional. The jurisdiction of the Supreme Court over the subject matter of this appeal is based upon the fact that the judgment in each of the above-styled causes exceeds $10,000.00.

Filed with this Notice of Appeal:

[x] Appellant has filed a $50.00 docket fee.

[x] Appellant is exempted by law from giving security for cost of appeal by virtue of §6-5-1, *Code of Alabama 1975.*

Filed November 2, 1981
Date

Certified as a true copy:

Pauline C. Edwards
CIRCUIT CLERK

Charles A. Graddick
CHARLES A. GRADDICK,
Attorney General
State of Alabama

Herbert I. Burson, Jr.
HERBERT I. BURSON, JR.
Chief Counsel, Department of Revenue, and Assistant Attorney General, State of Alabama

John J. Breckenridge
JOHN J. BRECKENRIDGE,

Assistant Counsel, Department of Revenue, and Assistant Attorney General, State of Alabama

Charles E. Crumbley

CHARLES E. CRUMBLEY,
Assistant Counsel, Department of Revenue, and Assistant Attorney General, State of Alabama, 201 Administrative Building, Montgomery, AL 36130, Telephone: 832-5640

COUNSEL FOR APPELLANT

DESIGNATION OF RECORD ON APPEAL

Appellant requests the Clerk to include the entire record (less those items set forth in Rule 10(a) in the Clerk's record.

DESIGNATION OF REPORTER'S TRANSCRIPT

The reporter's transcript has previously been compiled and is a part of the record.

CERTIFICATE OF FILING

I certify that I have this date filed with the Clerk of the trial court the original and three copies of the foregoing *Notice of Appeal* (along with a $50.00 docket fee) and such other instruments as have been completed and included herein, for service by the Clerk of a true copy thereof on each of the following:

1. The Clerk of the Supreme Court, together with the $50.00 docket fee.

2. Counsel for Appellees, Rae M. Crowe, Esq., Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, 1101 Merchants National Bank Building, P.O. Box 290, Mobile, Alabama, 36601.

Euel A. Screws, Jr., Esq., Copeland, Franco, Screws & Gill, P.O. Box 347, Montgomery, Alabama, 36101.

Robert C. Black, Esq., Hill, Hill, Carter, Franco, Cole & Black, Second Floor, Hill Building, Montgomery, Alabama, 36104.

James R. Seale, Esq., Capell, Howard, Knabe & Cobbs, P.O. Box 2069, Montgomery, Alabama, 36103.

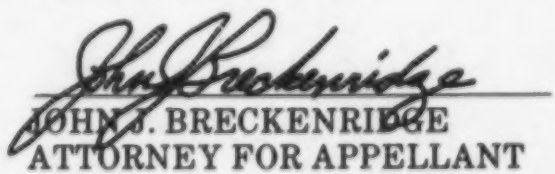
Macbeth Wagon, Jr., Esq., Bradley, Arant, Rose & White, 1500 Brown-Marx Building, Birmingham, Alabama, 35203.

L. Murray Alley, Esq., Cabaniss, Johnston, Gardner, Dumas & O'Neal, 1900 First National-Southern Natural Building, Birmingham, Alabama, 35203.

Edward S. Allen, Esq., Balch, Bingham, Baker, Hawthorne, Williams & Ward, P.O. Box 306, Birmingham, Alabama, 35201.

Porter, Gonzalez & Rogers, 1800 Guaranty Bank Plaza, Corpus Christi, Texas, 78475.

Dated this the 2nd day of November, 1981.



JOHN J. BRECKENRIDGE
ATTORNEY FOR APPELLANT

Appendix C

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

MAILING ADDRESS:
P. O. Box 157
Montgomery, Alabama 36101
Telephone: 832-6480

November 10, 1981

Re: 81-128

RALPH P. EAGERTON, JR., etc.
Appellant

vs.

EXCHANGE OIL AND GAS CORPORATION, et al
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Appeal docketed. Future correspondence should refer to the above number.

Clerk, Supreme Court of Alabama

Appendix D

IN THE FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

EXCHANGE OIL AND GAS CORPORATION, a corporation,	)	
Plaintiff,	)	Civil Action Nos. CV-79-1284-H
vs.	)	CV-80-224-H, CV-80-568-H,
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-889
Defendant.	)	
CITMOCO SERVICES, INC., a corporation	)	
Plaintiff,	)	
vs.	)	Civil Action Nos. CV-79-1338-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	

Defendant.	)	
EXXON CORPORATION, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1529,
vs.	)	CV-80-121,
	)	CV-80-421
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-863-H
Defendant.	)	
GETTY OIL COMPANY, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1363-H
vs.	)	CV-80-226-H
	)	CV-80-565-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-886-H
Defendant.	)	
WARRIOR DRILLING AND ENGINEERING CO., INC., a corporation,	)	
	)	Civil Action Nos.
vs.	)	CV-79-1509-H
	)	CV-80-166-H

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-520-H CV-80-783-H
Defendant.	)	
GULF OIL CORPORATION, a corporation	)	
Plaintiff,	)	
vs.	)	Civil Action Nos. CV-79-1622 CV-80-509
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	
THE LOUISIANA LAND AND EXPLORATION COMPANY, a corporation	)	
Plaintiff,	)	Civil Action Nos. CV-80-006, CV-80-351
vs.	)	
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	

MIDROC OPERATING COMPANY, a corporation	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-80-168-H
vs.	)	CV-80-517-H
	)	CV-80-781-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	
PLACID OIL COMPANY, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-80-074-H
vs.	)	CV-80-229-H
	)	CV-80-567-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-887-H
Defendant.	)	
UNION OIL COMPANY OF CALIFORNIA, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1383-H
vs.	)	CV-80-225-H
	)	CV-80-566-H

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-888-H
Defendant.	)	
PETROLEUM CORPORATION OF TEXAS, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1397-H
	)	CV-80-228-H
vs.	)	CV-80-569-H
	)	CV-80-885-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	
PRUET PRODUCTION CO., a corporation,	)	
	)	Civil Action Nos.
vs.	)	CV-79-1508-H
	)	CV-80-165-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-519-H CV-80-780-H
Defendant.	)	
TERRA RESOURCES,	)	

INC., a corporation,	)	
	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1362-H
vs.	)	CV-80-227-H
	)	CV-80-564-H
RALPH P. EAGERTON,	)	CV-80-890-H
JR., as Commissioner	)	
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	
ANDERMAN OPERATING	)	
CO., a corporation,	)	
	)	Civil Action Nos.
vs.	)	CV-79-1510-H
	)	CV-80-167-H
RALPH P. EAGERTON,	)	CV-80-518-H
JR., as Commissioner	)	CV-080-782-H
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that Exchange Oil and Gas Corporation, Getty Oil Company, Warrior Drilling and Engineering Co., Inc., Midroc Operating Company, Placid Oil Company, Union Oil Company of California, Pruet Production Co., and Anderman Operating Co. appeal to the Supreme Court of Alabama from the Final Judgment of the Circuit Court of Montgomery County, Alabama, in the fifteenth Judicial Circuit, Honorable

Circuit Judge Perry Hooper, presiding, entered in the above-consolidated causes on September 30, 1981. The jurisdiction of the Supreme Court over the subject matter of this appeal is based upon the fact that the judgment in each of the above-styled causes exceeds $10,000.00 and equitable relief is involved.

Filed November 12, 1981.

Cetified as a true copy:

Pauline C. Eubanks

Circuit Clerk

Earl A. Scrivner

Attorney For Exchange Oil and Gas Corporation, Getty Oil Company, Placid Oil Company, and Union Oil Company of California

Of counsel:
Copeland, Franco, Screws
& Gill, P.A.
Post Office Box 347
Montgomery, Alabama 36101

James R Seale

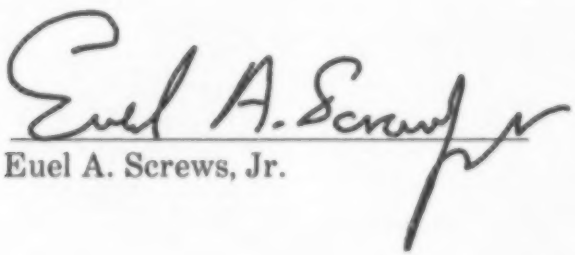
Attorney for Warrior Drilling and Engineering Co., Inc., Midroc Operating Company, Pruet Production Co., and Anderman Operating Co.

Of counsel:

Capell, Howard, Knabe
& Cobbs, P.A.
Post Office box 2069
Montgomery, Alabama 36103

Certificate of Service

I hereby certify that I have served a copy of the foregoing on all counsel of record by mailing them a copy of same by First Class United States Mail, postage prepaid, on this the 12th day of November, 1981.



Euel A. Screws, Jr.

IN THE FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

EXCHANGE OIL AND GAS CORPORATION, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1284-H
vs.	)	CV-80-224-H,
	)	CV-80-568-H,
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-889
Defendant.	)	
CITMOCO SERVICES, INC., a corporation	)	
Plaintiff,	)	
vs.	)	Civil Action Nos.
	)	CV-79-1338-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	

EXXON CORPORATION, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1529,
vs.	)	CV-80-121,
	)	CV-80-421
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-863-H
Defendant.	)	
GETTY OIL COMPANY, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1363-H
vs.	)	CV-80-226-H
	)	CV-80-565-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-886-H
Defendant.	)	
WARRIOR DRILLING AND ENGINEERING CO., INC., a corporation,	)	
	)	Civil Action Nos.
vs.	)	CV-79-1509-H
	)	CV-80-166-H
RALPH P. EAGERTON, JR., as Commissioner	)	CV-80-520-H CV-80-783-H

of Revenue of the State of Alabama,	)	
Defendant.	)	
GULF OIL CORPORATION, a corporation	)	
Plaintiff,	)	
vs.	)	Civil Action Nos. CV-79-1622 CV-80-509
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	
THE LOUISIANA LAND AND EXPLORATION COMPANY, a corporation	)	
Plaintiff,	)	Civil Action Nos. CV-80-006, CV-80-351
vs.	)	
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	
MIDROC OPERATING COMPANY, a corporation	)	

Plaintiff,	)	Civil Action Nos.
	)	CV-80-168-H
vs.	)	CV-80-517-H
	)	CV-80-781-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	
PLACID OIL COMPANY, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-80-074-H
vs.	)	CV-80-229-H
	)	CV-80-567-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-887-H
Defendant.	)	
UNION OIL COMPANY OF CALIFORNIA, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1383-H
vs.	)	CV-80-225-H
	)	CV-80-566-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the	)	CV-80-888-H

State of Alabama,	)	
	)	
Defendant.	)	
PETROLEUM CORPORATION OF TEXAS, a corporation,	)	
	)	
	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1397-H
	)	CV-80-228-H
vs.	)	CV-80-569-H
	)	CV-80-885-H
RALPH F. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
	)	
	)	
	)	
	)	
Defendant.	)	
PRUET PRODUCTION CO., a corporation,	)	
	)	
	)	Civil Action Nos.
vs.	)	CV-79-1508-H
	)	CV-80-165-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-519-H
	)	CV-80-780-H
	)	
	)	
	)	
Defendant.	)	
TERRA RESOURCES, INC., a corporation,	)	
	)	
	)	
Plaintiff,	)	Civil Action Nos.

	)	CV-79-1362-H
vs.	)	CV-80-227-H
	)	CV-80-564-H
RALPH P. EAGERTON,	)	CV-80-890-H
JR., as Commissioner	)	
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	
ANDERMAN OPERATING	)	
CO., a corporation,	)	
	)	Civil Action Nos.
vs.	)	CV-79-1510-H
	)	CV-80-167-H
RALPH P. EAGERTON,	)	CV-80-518-H
JR., as Commissioner	)	CV-080-782-H
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	

SECURITY FOR COSTS

We hereby acknowledge ourselves security for costs of appeal. For the payment of all costs secured by this undertaking, we hereby waive our right of exemption as to personal property under the Constitution and Laws of the State of Alabama

Executed with our seals this 19th day of November, 1981.

EXCHANGE OIL AND GAS CORPORATION

Appellant-Surety

By _____
Its Attorney

GETTY OIL COMPANY
Appellant-Surety

By _____
Its Attorney

PLACID OIL COMPANY
Appelant-Surety

By _____
Its Attorney

UNION OIL COMPANY OF
CALIFORNIA
Appellant-Surety

By _____
Its Attorney

WARRIOR DRILLING AND
ENGINEERING CO., INC.
Appellant-Surety

By _____
Its Attorney

MIDROC OPERATING
COMPANY
Appellant-Surety

By _____
Its Attorney

PRUET PRODUCTION CO.
Appellant-Surety

By _____
Its Attorney

ANDERMAN OPERATING CO.
Appellant-Surety

By _____
Its Attorney

_____ L.S.
Surety

_____ L.S.
Surety

_____ L.S.
Surety

_____ L.S.
Surety

Filed and approved:
November 18, 1981

Nov. 18, 1981

Pauline C. Edwards

Clerk

IN THE FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

EXCHANGE OIL AND GAS CORPORATION, a corporation, Plaintiff,	)	Civil Action Nos. CV-79-1284-H
vs.	)	CV-80-224-H, CV-80-568-H,
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, Defendant.	)	CV-80-889
CITMOCO SERVICES, INC., a corporation Plaintiff,	)	
vs.	)	Civil Action Nos. CV-79-1338-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, Defendant.	)	

EXXON CORPORATION, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1529,
vs.	)	CV-80-121,
	)	CV-80-421
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-863-H
Defendant.	)	
GETTY OIL COMPANY, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1363-H
vs.	)	CV-80-226-H
	)	CV-80-565-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-886-H
Defendant.	)	
WARRIOR DRILLING AND ENGINEERING CO., INC., a corporation,	)	
	)	Civil Action Nos.
vs.	)	CV-79-1509-H
	)	CV-80-166-H
RALPH P. EAGERTON, JR., as Commissioner	)	CV-80-520-H CV-80-783-H

of Revenue of the State of Alabama,	)	
Defendant.	)	
GULF OIL CORPORATION, a corporation	)	
Plaintiff,	)	
vs.	)	Civil Action Nos. CV-79-1622 CV-80-509
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	
THE LOUISIANA LAND AND EXPLORATION COMPANY, a corporation	)	
Plaintiff,	)	Civil Action Nos. CV-80-006,
vs.	)	CV-80-351
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	
MIDROC OPERATING COMPANY, a corporation	)	

Plaintiff,	)	Civil Action Nos.
	)	CV-80-168-H
vs.	)	CV-80-517-H
	)	CV-80-781-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
Defendant.	)	
PLACID OIL COMPANY, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-80-074-H
vs.	)	CV-80-229-H
	)	CV-80-567-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-887-H
Defendant.	)	
UNION OIL COMPANY OF CALIFORNIA, a corporation,	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1383-H
vs.	)	CV-80-225-H
	)	CV-80-566-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the	)	CV-80-888-H

State of Alabama,	)	
	)	
Defendant.	)	
PETROLEUM CORPORATION OF TEXAS, a corporation,	)	
	)	
	)	
Plaintiff,	)	Civil Action Nos.
	)	CV-79-1397-H
	)	CV-80-228-H
vs.	)	CV-80-569-H
	)	CV-80-885-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	
	)	
	)	
Defendant.	)	
PRUET PRODUCTION CO., a corporation,	)	
	)	
	)	Civil Action Nos.
vs.	)	CV-79-1508-H
	)	CV-80-165-H
RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama,	)	CV-80-519-H
	)	CV-80-780-H
	)	
	)	
Defendant.	)	
TERRA RESOURCES, INC., a corporation,	)	
	)	
	)	
Plaintiff,	)	Civil Action Nos.

	)	CV-79-1362-H
vs.	)	CV-80-227-H
	)	CV-80-564-H
RALPH P. EAGERTON,	)	CV-80-890-H
JR., as Commissioner	)	
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	
ANDERMAN OPERATING	)	
CO., a corporation,	)	
	)	Civil Action Nos.
vs.	)	CV-79-1510-H
	)	CV-80-167-H
RALPH P. EAGERTON,	)	CV-80-518-H
JR., as Commissioner	)	CV-080-782-H
of Revenue of the	)	
State of Alabama,	)	
	)	
Defendant.	)	

DESIGNATION OF RECORD ON APPEAL

Designation of Clerk's Record

Appellant requests the clerk to include the following checked materials in the clerk's record:

Entire record [less those items set forth in Rule 10(a)]

Designation of Reporter's Transcript

Appellant requests Margaret May, Court Reporter,

Montgomery County Courthouse, 142 Washington Avenue, Montgomery, Alabama, 36104, 832-4950, to transcribe an original and 1 copy of the following as the reporter's transcript:

> All transcribed proceedings and testimony.
>
> NOTE: These proceedings have heretofore been transcribed and prepared as part of the record in an earlier appeal.

CERTIFICATE OF FILING

I certify that on November 12, 1981, I filed with the Clerk of the trial court the original and 8 copies of the notice of appeal (along with the required docket fee) and on this 18th day of November, 1981, this Designation of Record and Certificate of Filing have been completed and included herein, for service by the Clerk of a true copy thereof on each of the following:

1. Clerk of the appellate court
2. Court reporter
3. Counsel for appellee.

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Montgomery, Alabama 36103

Certificate of Service

I hereby certify that I have served a copy of the foregoing on all counsel of record by mailing them a copy of same by First Class United States Mail, postage prepaid, on this the 18th day of November, 1981.

Euel A. Screws, Jr.

Appendix E

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

MAILING ADDRESS:
P. O. Box 157
Montgomery, Alabama 36101
Telephone: 832-6480

November 10, 1981

Re: 81-128

RALPH P. EAGERTON, JR., etc.
Appellant

vs.

EXCHANGE OIL AND GAS CORPORATION, et al
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

Appeal docketed. Future correspondence should refer to the above number.

J. A. Sentell

Clerk, Supreme Court of Alabama

Appellant's Reply Brief

No. 81–1020

Office - Supreme Court, U.S.
FILED
FEB 16 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EXXON CORPORATION, GULF OIL CORPORATION AND THE LOUISIANA LAND AND EXPLORATION COMPANY,
Appellants,

v.

RALPH EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, et al.
Appellees.

On Appeal from the Supreme Court of the State of Alabama

BRIEF OPPOSING MOTION TO DISMISS APPEAL

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No. 81-1020

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EXXON CORPORATION, GULF OIL CORPORATION AND THE LOUISIANA LAND AND EXPLORATION COMPANY,

Appellants, [1]

V.

RALPH P. EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, et al.

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

May it please the court:

Appellee's Motion to Dismiss Appeal asserts that the decision of the Supreme Court of Alabama is not "final" because it "reversed and remanded" the case to the trial court and because some of the parties (not the Appellants who bring this appeal) were involved in further proceedings upon remand. [2] Appellee is in error for the following reasons:

---

1 The listing of appellants' parent companies, subsidiaries, and affiliates required by Rule 28.1 may be found in Appendix O of Appellants' Jurisdictional Statement.

2 Significantly, Appellee has made no argument whatsoever that the issues presented by this appeal do not involve substantial questions.

1. Respecting the three Appellants who bring this appeal (as distinguished from other oil companies which were plaintiffs in other cases in the trial court and which are Appellants in Case No. 81-1268 before this Court), the trial court after remand from the Supreme Court of Alabama simply carried out the decision of the Supreme Court of Alabama by vacating the pre-appeal orders; and these three Appellants have not appealed from this action. The trial court's Final Opinion and Judgment on remand (Exhibit H to Appellants' Jurisdictional Statement) shows that, respecting Appellants herein, the pre-appeal judgments and orders were vacated and no further action was taken. Appellee's Notice of Appeal to the Supreme Court of Alabama for the pending appeal (Appendix B to Appellee's Motion to Dismiss Appeal) shows that the Notice of Appeal was not even served upon counsel for Appellants herein. Appendix D to Appellee's Motion to Dismiss Appeal shows that the oil companies involved in the pending post-remand appeal to the Supreme Court of Alabama do not include the three Appellants who bring this appeal.

A careful reading of Appellee's Motion to Dismiss Appeal shows that only "some of the Appellant Oil Companies" are involved in the pending appeal before the Supreme Court of Alabama, but not the three Appellants who bring this appeal. [3] It is the Appellants in Case No. 81-1268, Supreme Court of the United States, which are involved in the pending appeal before the Supreme Court of Alabama (as is also indicated by Appellee's Motion to Dismiss Appeal filed in that case).

2. Appellants have met the finality requirement of 28

---

3 The pending appeal to the Supreme Court of Alabama cannot possibly affect any rights of the three Appellants herein even if, for the sake of argument, they should be regarded as parties to that appeal.

U.S.C. §1257(2) even though, arguably, the order of the Alabama Supreme Court "did not literally end the case." *See Mills v. Alabama*, 384 U.S. 214, 217 (1966). Further state court action on this case will only address matters subject to resolution on independent state grounds and such matters will not dispose of the case. The federal constitutional issues previously decided by the Supreme Court of Alabama will be unaffected by the pending appeal to that court; these issues will still require decision regardless of the outcome of further state court proceedings. Accordingly, this appeal comes within one of the several categories where the Court should treat the state court decision as a final judgment without awaiting the completion of additional state court proceedings. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). See also *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). Furthermore, since the state court appeal taken by parties other than the three Appellants herein addresses only issues of state law, the "final decision" in this case, if and when it is rendered by the Supreme Court of Alabama, will leave the litigation in such posture that an appeal from that decision cannot raise the constitutional questions presented by this appeal. To ensure to Appellants the preservation of these issues, an appeal should be allowed at this time despite the pendency of further state court proceedings. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

Respectfully submitted,

C. B. Arendall, Jr. per mas

C. B. ARENDALL, JR.

Louis E. Braswell jr. mes.
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NO. 81-1020

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

EXXON CORPORATION, GULF OIL CORPORATION AND THE LOUISIANA LAND AND EXPLORATION COMPANY,
Appellants,

v.

RALPH EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, et al.
Appellees.

On Appeal From the Supreme Court of the State of Alabama

PROOF OF SERVICE

I, LOUIS E. BRASWELL, one of the attorneys for Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of February, 1982, I served copies of the foregoing Brief Opposing Motion to Dismiss Appeal on all parties required to be served, as follows:

1. On appellee herein, Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, by depositing a copy in a United States post office, with first class postage

prepaid, addressed to John J. Breckenridge, his counsel of record, at 201 Administrative Building, Montgomery, Alabama 36130.

2. On all other parties to the proceeding below, by depositing copies in a United States post office, with first class postage prepaid, addressed to their respective attorneys of record, as follows:

To Rae M. Crow, Esq., Attorney for Exchange Oil and Gas Corporation, Getty Oil Company, Placid Oil Company, Terra Resources, Inc., and Union Oil Company of California,
1101 Merchants National Bank Building
Post Office Box 290
Mobile, Alabama 36601;

To Euel A. Screws, Jr., Esq., Attorney for Exchange Oil and Gas Corporation, Getty Oil Company, Placid Oil Company, Terra Resources, Inc., and Union Oil Company of California,
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To Robert C. Black, Esq., Attorney for Citmoco Services, Inc.,
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Montgomery, Alabama 36104;

To James R. Seale, Esq., Attorney for Anderman Operating Company, Midroc Operating Company, Pruet Production Company, and Warrior Drilling and Engineering Company, Inc.,
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To Macbeth Wagnon, Jr., Esq., Attorney for Alabama Gas Corporation and Alagasco Pipeline Company,
1500 Brown-Marx Building
Birmingham, Alabama 35203;

To L. Murray Alley, Esq., Attorney for Southern Natural Gas Company,
1900 First National-Southern Natural Building
Birmingham, Alabama 35203;

To Edward S. Allen, Esq., Attorney for Coronado Transmission Company,
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Birmingham, Alabama 35201;

To Porter, Gonzalez & Rogers, Attorneys for Petroleum Corporation of Texas,
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Louis E. Braswell

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Amicus Brief for the United States

Supreme Court, U.S.
FILED
APR 22 1982
ALEXANDER L. STEVAS
CLERK

Nos. 81-1020 and 81-1268

In the Supreme Court of the United States

OCTOBER TERM, 1981

EXXON CORPORATION, ET AL., APPELLANTS

v.

RALPH P. EAGERTON, JR., COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, ET AL.

EXCHANGE OIL AND GAS CORPORATION, ET AL., APPELLANTS

v.

RALPH P. EAGERTON, JR., COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, ET AL.

ON APPEALS FROM THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

REX E. LEE
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Solicitor

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QUESTION PRESENTED

Amici will address the question whether an Alabama oil and gas severance tax statute that prohibited producers of crude oil and natural gas from "passing-through" the cost of such tax to consumers violated the Supremacy Clause on the ground that it was inconsistent with federal regulation of oil and gas prices pursuant to the Emergency Petroleum Allocation Act, 15 U.S.C. (& Supp. IV) 751 *et seq.* and the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3301 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1020

EXXON CORPORATION, ET AL., APPELLANTS

v.

RALPH P. EAGERTON, JR., COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, ET AL.

No. 81-1268

EXCHANGE OIL AND GAS CORPORATION, ET AL., APPELLANTS

v.

RALPH P. EAGERTON, JR., COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, ET AL.

ON APPEALS FROM THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1979 the Alabama Legislature enacted Act No. 79-434 (J.S. App. 1i-4i),[1] which amended the State's oil and gas severance tax laws by generally increasing the tax rate from the previous level of 4% to 6% of the gross value of the

---

[1] "J.S. App." refers to the appendix to the jurisdictional statement in No. 81-1020.

oil or gas at the point of production. Act No. 79-434 became effective on September 1, 1979, and provided in pertinent part (J.S. App. 3i):

> The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.

This provision was repealed on May 28, 1980 (81-1020 J.S. 2).

2. Appellants paid the 2% increase in the severance tax under protest and filed suit in the Circuit Court of Montgomery County, Alabama, seeking: (1) a declaratory judgment that Act No. 79-434 was unconstitutional, and (2) a refund of the taxes paid under protest (J.S. App. 2b). The circuit court granted relief for appellants (J.S. App. 1b-55b). The court noted (*id.* at 42b), inter alia, that in November 1978, Congress enacted the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. (Supp. IV) 3301 *et seq.*, which establishes maximum lawful prices for "first sales" (generally wellhead sales) of various categories of natural gas in intrastate as well as interstate commerce.[2] Section 110(a)(1) of the NGPA, 15 U.S.C. (Supp. IV) 3320(a)(1), permits gas producers to charge the maximum lawful price, *plus* any state severance taxes:

---

[2]Congress' purpose in bringing intrastate sales under federal price regulation was to eliminate the economic distortions resulting from the disparate treatment of unregulated intrastate and regulated interstate natural gas sales. See *Maryland* v. *Louisiana*, 451 U.S. 725, 747 n.22 (1981).

> * * * a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extent necessary to recover—
>
> (1) State severance taxes attributable to the production of such natural gas and borne by the seller * * *.

15 U.S.C. (Supp. IV) 3320(a)(1). Under the NGPA, the circuit court concluded, appellants "are entitled to 'pass through' increases in severance taxes" (J.S. App. 43b). Because "the Federal Government has preempted the field of cost and pricing of natural gas," the court ruled that the State of Alabama was precluded "from legislating in this field," and the pass-through prohibition was therefore unconstitutional (*ibid.*). Accordingly, the court declared Act No. 79-434 to be null and void and it ordered appellee to refund to appellants the taxes they had paid pursuant to the statute (*id.* at 55b; see J.S. App. 1g-19g).

The Supreme Court of Alabama reversed (J.S. App. 1a-15a). That court disagreed with the circuit court's conclusion that Section 110(a)(1) of the NGPA barred the state legislature from prohibiting the pass-through of severance tax increases. The court explained (J.S. App. 11a):

> Nowhere in that section is it stated that the oil companies are entitled to "pass-through" increases on state severance taxes. Rather, the Act merely provides that the lawful ceiling on the first sale at the wellhead may be raised if a severance tax is imposed by the states. The two Acts are aimed at entirely different purposes. In other words, although it would be perfectly permissible for the oil and gas companies to raise the price for the first sale of natural gas, subject to the limitations of the Natural Gas Policy Act, all that Act No. 79-434

requires is that the increase in severance tax mandated by that Act be borne by the producer or severer of the oil or gas. Thus, the pass-through prohibition contained in Act No. 79-434 does not conflict with the Natural Gas Policy Act of 1978, and the trial court's finding to that effect is due to be reversed.

DISCUSSION

Appellants contend (81-1020 J.S. 6-11; 81-1268 J.S. 6-9) that the pass-through prohibition in Act No. 79-434 violated the Supremacy Clause because it interfered with federal regulation of oil and gas prices. The preemption issue presented here must be analyzed separately with respect to crude oil and natural gas because federal regulation of the prices of those commodities during the relevant period was accomplished through different statutory schemes. Insofar as natural gas is concerned, we agree with appellants that the state statute was unconstitutional because it was in direct conflict with Section 110 of the NGPA, 15 U.S.C. (Supp. IV) 3320. As for crude oil, we note that neither court below addressed the question whether the state statute was preempted by the federal regulatory program under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. (& Supp. IV) 751 *et seq.* We also note that the EPAA expired by its own terms in September 1981. Accordingly, there is a serious question whether, in light of the expiration of federal price control authority, any federal interest remains that would bar Alabama from enforcing its law for the period between September 1979 and May 1980, during which both the EPAA and the state law were in effect. See *Tully* v. *Mobil Oil Corp.*, No. 81-96 (Feb. 22, 1982).

1. The pass-through prohibition of the Alabama statute conflicted with, and was preempted by, Section 110 of the NGPA. In ruling to the contrary, the Alabama Supreme Court appears to have concluded that both the federal and state statutes permit gas producers to increase their prices in

response to an increase in their severance taxes, but that the Alabama statute precludes producers from calling the increase a tax "reimbursement." In the NGPA, however, Congress explicitly provided that consumers are to bear the cost of severance taxes, in addition to the applicable maximum lawful price, "to the extent necessary" to permit the seller to "recover" such taxes.[3]

Contrary to the scheme of federal regulation embodied in the NGPA, under the Alabama statute a producer that was already charging the maximum lawful price established by the NGPA for a first sale of its gas would not be permitted to recover the increased severance tax from the purchaser. This conflict between the state and federal statutes is a sufficient basis for application of the Supremacy Clause.

Although consideration of the question of preemption begins with the basic assumption that Congress did not intend to displace state law (see *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)), where Congress imposes a pervasive scheme of regulation the inference is inescapable that Congress intended to leave no room for the states to supplement it. See *Pennsylvania R.R.* v. *Public Service Commission*, 250 U.S. 566, 569 (1919). It has long been settled that in enacting the Natural Gas Act, 15 U.S.C. 717 *et seq.*, Congress created a comprehensive scheme that occupied the field of regulating wholesale pricing of natural gas in interstate commerce. See, *e.g.*, *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 519-520 (1947); *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 690 (1947). This point was

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[3]This is in contrast to other producer costs, such as costs of compressing, gathering and processing, which may be passed through in addition to maximum lawful prices, but only if the Commission, by rule or order, allows the pass-through. See 15 U.S.C. (Supp. IV) 3320(a)(2).

recently reiterated in *Maryland* v. *Louisiana*, 451 U.S. 725, 748 (1981):

> The Gas Act was intended to provide the Federal Power Commission, now the FERC, with authority to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682 (1954).

In enacting the NGPA, Congress extended that comprehensive scheme of regulation to wellhead sales of natural gas in intrastate commerce. 15 U.S.C. (Supp. IV) 3301(21) and 3315.

The Alabama statute undermined this regulatory scheme by precluding producers from recovering severance taxes in both intrastate and interstate sales of natural gas.[4] Because the state statute is at odds with Section 110 of the NGPA, it must give way under the Supremacy Clause.

2. Appellants argue (81-1020 J.S. 9-10; 81-1268 J.S. 8-9) that, with respect to crude oil, the Alabama statute was preempted by the federal regulatory program under the EPAA. Although some courts have held that similar anti-pass-through provisions in state statutes were preempted by the federal regulatory scheme under the EPAA (*Mobil Oil Corp.* v. *Tully*, 499 F. Supp. 888 (N.D. N.Y. 1980), aff'd, 653 F. 2d 497 (Temp. Emer. Ct. App. 1981), vacated, No. 81-96 (Feb. 22, 1982); *Mobil Oil Corp.* v. *Dubno*, 492

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[4]We note that Section 602(a) of the NGPA, 15 U.S.C. (Supp. IV) 3432(a), permits states to set prices for intrastate producer sales of natural gas at levels that are lower than the maximum lawful prices established by Congress. But that provision has no bearing here, because the Alabama statute applies to interstate as well as intrastate sales and also because, as the Alabama Supreme Court observed (J.S. App. 11a), the statute at issue did not purport to enact a lower maximum lawful price for the gas.

F. Supp. 1004 (D. Conn. 1980)), we believe that the EPAA preemption issue is a difficult one. Section 6(b) of the EPAA, 15 U.S.C. 755(b), provided that regulations under that Act "shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation * * *." However, the pertinent federal regulations, which are no longer in effect, simply established a maximum price level for crude oil and did not specifically permit or prohibit the pass-through of severance taxes to purchasers. See 10 C.F.R. 212.71-212.79 (1980). Thus, it is arguable that the Alabama statute did not actually conflict with the federal regulatory program under the EPAA and was not preempted by that Act. On the other hand, there is some force to the conclusion reached by TECA in *Mobil Oil Corp.* v. *Tully, supra,* 653 F. 2d at 502, that a state anti-pass-through provision such as that involved here is an attempt "to affect the structure of prices charged by the oil companies pursuant to federal regulation" and, as such, is subject to preemption because it is "in conflict with the objectives of the [federal] program." In light of the expiration of the EPAA, however, a serious question has arisen whether there continues to be "any federal interest that would prevent the state of [Alabama] from now enforcing its law so as to prevent [appellants] from passing through taxes which accrued" during the period in which both the EPAA and the Alabama statute were in effect (*Tully* v. *Mobil Oil Corp., supra,* slip op. 3). The Court may wish to defer consideration of this question until TECA has had an opportunity to address it in the *Tully* case.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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APRIL 1982

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Appellant's Brief

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NO. 81-1020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EXXON CORPORATION, GULF OIL CORPORATION
AND
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Appellants,

versus

RALPH EAGERTON, JR., as Commissioner of
Revenue of the State of Alabama, et al.
Appellees.

On Appeal From The Supreme Court
of The State of Alabama

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether the Royalty Owner Exemption and the Pass-Through Prohibition of the Alabama Severance Tax Statute significantly interfere with the federal regulatory scheme concerning the transportation and sale of natural gas in violation of the Supremacy Clause.

2. Whether the Royalty Owner Exemption and the Pass-Through Prohibition of the Alabama Severance Tax Statute unconstitutionally impair pre-existing contractual provisions which would otherwise allow the appellants to recover all or a portion of the severance tax burden from parties to leases, sales contracts, and other agreements, in violation of the Contract Clause.

3. Whether the Alabama Severance Tax Statute, which defines working interest owners and royalty interest owners as one class, unconstitutionally discriminates against working interest owners not only by exempting royalty interest owners from payment of the increase imposed by the statute, but also by taxing working interest owners on the value of production attributable to such royalty interest owners, in violation of the Equal Protection Clause of the Fourteenth Amendment.

4. Whether the combination of the Royalty Owner Exemption and the Pass-Through Prohibition of the Alabama Severance Tax Statute forces the working interest owners to bear the burden of the 2% tax increase on royalty interests and arbitrarily and unreasonably distributes this additional tax burden unequally among the working interest owners in violation of the Equal Protection Clause of the Fourteenth Amendment.

LIST OF PARTIES TO PROCEEDINGS BELOW

Appellees Below: 1/

Anderman Operating Company, a corporation; Citmoco Services, Inc., a corporation; Exchange Oil and Gas Corporation; Exxon Corporation, a corporation; Getty Oil Company, a corporation; Gulf Oil Corporation, a corporation; The Louisiana Land & Exploration Company, a corporation; Midroc Operating Company, a corporation; Petroleum Corporation of Texas; Placid Oil Company; Pruet Production Company, a corporation; Terra Resources, Inc.; Union Oil Company of California; and Warrior Drilling and Engineering Company, Inc., a corporation. 2/

Appellant Below:

Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama.

1/ Although there were fourteen Appellees below, only Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company bring this appeal. Additional parties, Alabama Gas Corporation, Alagasco Pipeline Company, Southern Natural Gas Company and Coronado Transmission Company were parties in the trial court but did not participate in, and were not regarded as Appellees or Appellants in, the proceeding before the Supreme Court of Alabama. Nevertheless, they are being treated as Appellees in this proceeding and have been served with copies of the Notice of Appeal to the Supreme Court of the United States, Appellants' Jurisdictional Statement and this brief.

2/ The listing required by Rule 28.1 naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Appellants is contained in Appendix O of Appellants' Jurisdictional Statement. An update of that listing is included herein as Appendix A.

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NO. 81-1020

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EXXON CORPORATION, GULF OIL CORPORATION AND THE LOUISIANA LAND AND EXPLORATION COMPANY,

Appellants,

versus

RALPH EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, et al.

Appellees.

On Appeal From The Supreme Court of The State of Alabama

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the Supreme Court of Alabama which is to be reviewed was entered on July 10, 1981. This opinion appears in the Official Reports for Alabama at 404 So. 2d 1 (Ala. 1981). The opinion of the trial court, the Circuit Court of Montgomery County, Alabama, does not appear in any official or unofficial report.

JURISDICTIONAL BASIS OF THIS APPEAL

This is an appeal from the final judgment of the Supreme Court of Alabama holding constitutional an Alabama oil

and gas severance tax statute that was challenged on several grounds by the appellant-taxpayers as being repugnant to the Constitution and laws of the United States. The opinion and judgment of the Supreme Court of Alabama were entered on July 10, 1981. After timely applications for rehearing were filed, an order was entered denying the rehearing on September 4, 1981. The Notice of Appeal was timely filed with the Clerk of the Supreme Court of Alabama on November 23, 1981, and was also timely filed with the Clerk of the Circuit Court of Montgomery County, Alabama on November 23, 1981. This Court noted probable jurisdiction on May 17, 1982.

The Court's jurisdiction over this appeal is conferred by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

This appeal involves the validity of an Alabama statute under the Supremacy Clause of the United States Constitution, art. VI, cl.2, the Contract Clause of the United States Constitution, art I, sec. 10, cl. 1, and the Equal Protection Clause of the Fourteenth Amendment. The relevant portions of these Constitutional provisions were set forth in Appendix J to Appellants' Jurisdictional Statement. The challenged statute is an Alabama oil and gas severance tax statute, Act No. 434 of the 1979 Regular Session of the Alabama Legislature, which is set forth in the Joint Appendix at page 72.

Also involved are federal statutes related to the regulatory scheme for the price of natural gas. The statutes pertaining to this regulatory scheme are the Natural Gas Act, 15 U.S.C. §§717 *et seq.*, and the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301 *et seq.* The pertinent sections, 15 U.S.C. §§717 (a)–(b), 717c and 15 U.S.C. §§3319–3320 are set forth in Appendices K and L to Appellants'

Jurisdictional Statement.

STATEMENT OF THE CASE

The Case

Appellants are producers of oil and gas in Alabama, who seek on various federal constitutional grounds to invalidate an Alabama severance tax amendment which by its provisions increased the Alabama oil and gas severance tax and barred Appellants from passing through the cost of the tax increase to their customers or to other parties who had agreed by preexisting contracts to bear a portion of this cost. The amendment also exempted royalty owners from payment of the increase and required other producers to bear the burden of the tax increase attributable to the production of the royalty owners.

The challenged statute was enacted as Act 434 by the 1979 Regular Session of the Alabama Legislature, and was in effect from September 1, 1979, until repealed May 28, 1980. During the effective period of the statute, Appellants paid their liability for the increase under protest and filed tax refund suits seeking to invalidate the tax and recover the protested payments in the Circuit Court of Montgomery County, Alabama. Successive similar suits were filed as additional taxes were paid and protested. All of the suits (along with similar suits filed by other Plaintiffs) were consolidated for trial. On June 12, 1980, the trial court ruled in favor of Appellants on all counts, holding the statute unconstitutional under the Alabama Constitution and the Constitution and laws of the United States. The trial court decided the cases in one opinion, although separate judgments were entered for the various Plaintiffs.

Judgments entered by the trial court ordered tax refunds of $1,529,764.70, $25,988.14 and $55,187.49 for Exxon

Corporation, Gulf Oil Corporation and the Louisiana Land and Exploration Company (Appellants) as well as other refunds for other Plaintiffs.

On July 30, 1980, the State filed a Notice of Appeal with the trial court and on July 10, 1981, the Supreme Court of Alabama reversed, holding the statute constitutional. After timely applications for rehearing were filed an order was entered denying the rehearing on September 4, 1981. The Notice of Appeal was filed in the Supreme Court of Alabama on November 23, 1981.

The questions and grounds presented for review in this appeal were presented in briefs filed with the trial court prior to its decision, were stated in the trial court's opinion, and were renewed in briefs before the Supreme Court of Alabama. The trial court held the challenged statute was unconstitutional under the Supremacy Clause, the Contract Clause and the Equal Protection Clause. The Supreme Court of Alabama held the statute constitutional, reversing the trial court on all points.

The Facts

Appellants are lessees and working interest owners engaged in oil and gas production in Alabama. In addition, Exxon and Gulf are operators of certain wells or production units and are also royalty owners.

Appellants all have contracts with other parties which obligate the other parties to be responsible for, or make reimbursement for, severance taxes. Appellants have gas sales contracts which define "additional tax" as covering an increase in production or severance taxes and which provide that "Buyer shall reimburse Seller for such additional tax." Additionally, Gulf is a party to a Casinghead Gas Contract which provides that all production and severance

taxes "shall be borne by Seller and Purchaser in the same proportions respectively that the parties from time to time share the proceeds" of the gas products to which the taxes relate. Louisiana Land and Exploration (as Lessee) has an Oil, Gas, and Mineral lease with T. R. Miller Mill Co., Inc. (as Lessor/Royalty Owner) which provides that Lessor "shall bear and pay. . . . Lessor's proportionate royalty share of . . . all applicable severance, production and other such taxes levied or imposed upon production from the leased premises." These contracts were the subject of a stipulation between the parties in the trial court as to certain facts with respect to the contracts. (J. A. 76).

The challenged Alabama severance tax statute (Act 434 of the 1979 Regular Session, Alabama Legislature) imposed an oil and gas severance tax increase from 4% to 6% upon Appellants as producers of oil and gas. It contained the following provision (hereinafter referred to as the "Pass-Through Prohibition") prohibiting the taxpayer-producers from passing on the tax burden of the increase:

> The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.

1979 Ala. Acts No. 434, Sec. 1.

It also contained the following provision exempting royalty owners from the increase in taxes:

> Any person who is a royalty owner shall be

> exempt from the payment of any increase in taxes herein levied and shall not be liable therefor.

1979 Ala. Acts No. 434, Sec. 1.

The trial court found that these provisions, when construed in concert, not only exempted royalty owners from payment of the tax increase but also required the producer to pay a tax on the royalty owner's share of the production attributable to the royalty owner's ownership of the mineral fee. The producer was then restricted by the statute from passing on the unequal tax burden. See Trial Court Opinion at J. A. 52.

Under application of the statute in question, Appellants paid under protest to the state for the period involved the entire 2% increase in severance tax applicable to the entire production from the leases, without deduction of any amount in respect of the royalty interests. Because of the Pass-Through Prohibition, Appellants were unable to seek reimbursement for the tax paid under the above contract provisions, either from oil and gas purchasers or royalty owners. The evidence shows leases involved provided for royalty interests from 12½% to as high as 54%. The disproportionate burden of the tax increase borne by producers under the act was magnified and progressively increased depending upon the percentage of production to which the royalty owner was entitled. See Trial Court Opinion at J. A. 23, 52.

SUMMARY OF ARGUMENT

Act 434, as passed by the Alabama Legislature, is unconstitutional under the Supremacy Clause of the United States Constitution, the Contract Clause of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment.

First, the Royalty Owner Exemption and the Pass-Through Prohibition of the severance tax statute violate the Supremacy Clause by significantly interfering with the federal regulation of the transportation and sale of natural gas. Congress has established an extensive regulatory scheme for the allocation and pricing of natural gas which precludes attempts by the states to mandate how production costs should be borne and allocated. Act 434 conflicts with this scheme and thus, under the Supremacy Clause, is unconstitutional.

The Pass-Through Prohibition, when combined with the Royalty Owner Exemption, also has the effect of impairing preexisting contractual agreements that would otherwise allow Appellants to recover all or a portion of the severance tax from the other parties to those contracts. Although a contract between private parties may not limit a state's authority to impose a tax, it may validly allocate the economic burden of paying that tax. Act 434 impairs such preexisting contractual provisions without any compelling reason for doing so in violation of the Contract Clause of the United States Constitution.

Additionally, the statute challenged in this appeal runs afoul of the Equal Protection Clause in that it discriminates against working interest owners by exempting royalty interest owners from paying the tax increase and by requiring the working interest owners to pay tax on the value of production attributable to such royalty interest owners. The definitional provisions of the Alabama severance tax

statute provide that working interest owners and royalty owners are members of the same class. As such, they must be accorded equal tax treatment. Act 434 fails to adhere to this principle and thereby violates the Fourteenth Amendment.

The Equal Protection Clause is also violated by the fact that the Royalty Owner Exemption and the Pass-Through Prohibition of Act 434, taken in concert, arbitrarily and unreasonably distribute the tax burden unequally among the working interest owners. Though working interest owners are all similarly situated or circumstanced, Act 434 treats working owners differently depending upon the size of the royalty interest under which each operates.

ARGUMENT

I. THE ROYALTY OWNER EXEMPTION AND THE PASS-THROUGH PROHIBITION OF THE ALABAMA SEVERANCE TAX STATUTE SIGNIFICANTLY INTERFERE WITH THE FEDERAL REGULATORY SCHEME CONCERNING THE TRANSPORTATION AND SALE OF NATURAL GAS IN VIOLATION OF THE SUPREMACY CLAUSE.

The challenged Alabama severance tax statute contained a Royalty Owner Exemption and a Pass-Through Prohibition which required the producer to bear the tax exclusively and prohibited the passing on of the tax burden. These provisions read as follows:

> (d) . . . Any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefor. (e) The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing

> or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.

1979 Ala. Acts No. 434, Sec. 1.

By stipulation it was established that Appellants were parties to various types of contracts which contained provisions stating that other parties should pay or make reimbursement for certain production, severance, gathering, occupation and similar taxes. Illustrative contracts included an oil and gas lease obligating the royalty owner to pay its proportionate share of all severance taxes, a gas purchase contract obligating the other party to make reimbursement for severance and similar taxes, and a casinghead gas contract requiring the parties to bear their proportionate shares of taxes. See Trial Court Stipulation at J. A. 76.

During the period the Alabama statute was in effect, the price of natural gas was subject to federal regulation by virtue of the Natural Gas Act, 15 U.S.C. §§717 *et seq.*, and the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.* In the Natural Gas Act, Congress declared "that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. §717(a). Regulation by the Federal Power Commission and now the Federal Energy Regulatory Commission was authorized. 15 U.S.C. §717c. The Natural Gas Policy Act of 1978 extended the scope of the regulations to cover intrastate sales of natural gas, imposed a maximum lawful price on the first sale of all production of natural gas, 15 U.S.C. §3319, and provided that the seller's recovery of

state severance taxes would not cause the sales price to exceed the maximum lawful price, 15 U.S.C. §3320.

In *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court held that Louisiana's First-Use Tax Act was unconstitutional under the Supremacy Clause because a statutory provision of the act interfered with the federal scheme for regulating the price of natural gas. The Louisiana statute expressly prohibited enforcement of any contract provision which attempted to allocate the cost of the tax to any party other than the ultimate purchaser. The following language of the Court is relevant:

> Under the present law, natural gas owners are entitled to recover from their customers all legitimate costs associated with the production, processing, and transportation of natural gas. See *FPC v. United Gas Pipe Line Co.*, 386 U.S. 237, 243 (1967) (cost of service normally includes proper allowance for taxes and this allowance is "obviously within the jurisdiction of the Commission"). As part of the First-Use Tax, Louisiana has directed that the amount of the Tax should be "deemed a cost associated with uses made by the owner in preparation of marketing of the natural gas." [47 La.Rev. State.] §1303C. The Act further provides that an owner shall not have an enforceable right to seek reimbursement for payment of the Tax from any third party other than a purchaser of the gas, ibid., even though the third party may be the owner of marketable hydrocarbons that are extracted from the gas in the course of processing.
>
> The effect of §1303C is to interfere with

> the FERC's authority to regulate the determination of the proper allocation of costs associated with the sale of natural gas to consumers . . . . Owners of natural gas are foreclosed by the operation of §1303C from entering into valid contracts requiring the owners of the extracted hydrocarbons to reimburse the pipelines for costs associated with transporting and processing these products.

451 U.S. at 748–50 (footnotes omitted).

Characterizing the Louisiana statute as an attempt to accomplish "a substantial usurpation of the authority of the FERC by dictating. . . the allocation of processing costs for the interstate shipment of natural gas," *id.* at 749, this Court held it invalid. Under the same reasoning, Alabama's attempt to usurp FERC's authority and to contravene Congress' determination that severance taxes can be passed through is also preempted. Cases finding similar pass-through prohibitions preempted because they frustrated federal energy policy are *Mobil Oil Corp. v. Dubno*, 492 F. Supp. 1004 (D. Conn. 1980), *aff'd in part and appeal dismissed in part*, 639 F.2d 919 (2d Cir. 1981), *cert. denied*, 452 U.S. 967 (1981) and *Mobil Oil Corp. v. Tully*, 499 F. Supp. 888 (N.D.N.Y. 1980), *aff'd in part*, 639 F.2d 912 (2d Cir. 1981), *aff'd*, 653 F.2d 497 (Temp. Emer. Ct. App. 1981), *vacated*, 102 S. Ct. 1047 (1982), *remanded*, No. 2-29 (Temp. Emer. Ct. App. 7/1/82). In *Tully*, the court held that, with respect to products then subject to detailed price regulations, the State of New York could not prevent the pass through of franchise tax costs when the federal regulators had determined that those costs could be passed through. Here, Congress itself made a similar determination in the NGPA with respect to the pass-through of severance taxes in natural

gas prices. 3/ These cases are in accord with *Maryland v. Louisiana*. They recognize that an extensive federal regulatory scheme, such as the one established for the allocation and pricing of natural gas, precludes attempts by the states to dictate how costs should be borne and allocated. 4/

3/ In *Dubno* and *Tully* the courts also held that the New York and Connecticut anti-pass-through provisions were preempted to the extent that they regulated products which the federal regulators had affirmatively decided should be free from price controls. As Judge Blumenfeld explained, the Connecticut provision "subjects to price regulation petroleum products that federal authorities have decided should be free of price regulation." 492 F. Supp. at 1014. That, Judge Blumenfeld concluded, caused it to " '[stand] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the [Emergency Petroleum Allocation Act]." *Id.*, *quoting*, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *Accord*, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (preemption occurs when the "failure of federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the federal statute.")

4/ *Dubno* and *Tully* arose under the Emergency Petroleum Allocation Act of 1973 ("EPAA") which required the President to promulgate regulations establishing an allocation program for petroleum and petroleum products. Pursuant to that authorization, the federal government established ceiling prices for petroleum and petroleum products. The issue of EPAA preemption is not presented by Appellants' appeal.

II. THE ROYALTY OWNER EXEMPTION AND PASS-THROUGH PROHIBITION OF THE ALABAMA SEVERANCE TAX STATUTE UNCONSTITUTIONALLY IMPAIR PREEXISTING CONTRACTUAL PROVISIONS WHICH WOULD OTHERWISE ALLOW THE APPELLANTS TO RECOVER ALL OR A PORTION OF THE SEVERANCE TAX BURDEN FROM PARTIES TO LEASES, SALES CONTRACTS, AND OTHER AGREEMENTS.

The Appellants have preexisting leases, sales contracts, and other agreements which are unconstitutionally impaired by the Royalty Owner Exemption and Pass–Through Prohibition of Act 434. Certain oil and gas leases provide that the royalty owner must bear its proportionate share of all severance taxes imposed on production. The Royalty Owner Exemption, in conjunction with the Pass-Through Prohibition, effectively voids these lease provisions. Appellants also have sales contracts which require the purchaser to pay any increase in severance tax or, alternatively, to bear its proportional share of the severance tax imposed. The Pass-Through Prohibition prevents enforcement of these sales contract provisions. Sample oil and gas lease provisions and sales contract covenants evidencing such agreements are contained in a trial court stipulation (J.A. 76).

Under Act 434, royalty owners are exempted from payment of the 2% tax increase. The Royalty Owner Exemption contained in the Act provides that "[a]ny person who is a *royalty owner* shall be *exempt* from the payment of *any increase in taxes herein levied and shall not be liable therefor.*" 1979 Ala. Act No. 434, Section 1. (Emphasis added).

Furthermore, by virtue of the Pass-Through Prohibition, tax attributable to royalty production which is not paid by

the royalty owners because of the royalty exemption is instead levied on the producers. The Pass-Through Prohibition states:

> The privilege tax herein levied shall be *absorbed* and paid by those persons engaged in the business of producing or severing oil or gas only . . . it being the express intent of this act that the tax herein levied shall be *borne exclusively by the producer* or severer of oil or gas. (Emphasis added).

Id.

Thus, the tax increase attributable to the royalty owner's production must be "absorbed" and "borne exclusively" by the producer or severer of the oil and gas. The Pass-Through Prohibition, together with the Royalty Owner Exemption, prevents a working interest owner from enforcing any preexisting lease provision which calls for the proportionate sharing between the working interest owner and the royalty owner of any applicable severance tax levied or imposed upon production from the leased premises.

Admittedly, the existence of a contract between private parties may not prevent or limit a state's authority to *levy* a tax. However, a contract specifying how the parties will allocate the economic burden of any tax imposed should be enforced. This view is supported by the holding of this Court in *Barwise v. Sheppard*, 299 U.S. 33 (1936).

In *Barwise*, the Court considered the constitutionality of an amendment to a Texas severance tax statute which provided that the tax "shall be borne ratably by all interested parties including royalty interests." *Id.* at 35. Prior to the amendment of this statute, the severance tax was not imposed on royalty interests. A royalty owner challenged

the amendment under the Contract Clause arguing that it impaired a lease provision which required the royalty to be delivered "free of cost." *Id.* In holding the amendment valid, the Court wrote:

> Plainly no stipulation in the lease can be of any avail as against the power of the State to impose the tax, prescribe who shall be under a duty to the State to pay it, and fix the time and mode of payment. *And this is true even though it be assumed to be admissible for the lessors and lessee to stipulate as to who, as between themselves, shall ultimately bear the the tax.* (Emphasis added).

Id. at 40.

Even though a private contract cannot limit the state's authority to impose a tax or designate the party required to collect and/or pay it, it may specify how the parties will allocate the tax burden between themselves. In holding that Act 434 did not unconstitutionally impair preexisting contracts, the Alabama Supreme Court misapplied *Barwise* by ignoring the distinction between a state's authority to levy a tax and the right of private parties to share the economic burden as agreed by contract. The Royalty Owner Exemption and Pass-Through Prohibition of Act 434 taken together thus impair preexisting terms of Appellants' lease agreements which allocate the economic burden of any severance tax between the contracting parties.

In addition to the impairment of the Appellants' lease agreements described above, the Pass-Through Prohibition of Act 434 voids preexisting contractual provisions contained in sales contracts and other agreements which would have ordinarily allowed Appellants to recover all or a portion of any severance tax imposed. Appellants have, for example,

numerous long-term gas contracts that require the purchaser to pay any increase in severance tax or, alternatively, to pay a proportional share of the severance tax imposed.

Article I, Section 10, Clause 1 of the Federal Constitution provides that "[n]o state shall. . . pass any . . . Law impairing the Obligation of Contracts." Recent decisions reflect this Court's willingness to invalidate state laws that impair contractual obligations in violation of the Federal Constitution. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) and *United States Trust Company v. New Jersey*, 431 U.S. 1 (1977).

In *Spannaus*, Minnesota enacted a statute requiring an employer of 100 or more persons to pay a "pension funding charge" if the employer had a qualified pension plan 5/ and terminated the plan or closed a Minnesota office. The charge was to provide full pensions for those employees who had worked at least ten years, but whose benefits were not yet vested under the company plan. The Court held the statute unconstitutional under the Contract Clause because it "nullifi[ed] express terms of the company's contractual obligations and impos[ed] a completely unexpected liability." 438 U.S. at 247.

Similarly, the Court in *United States Trust Co.* invalidated two state statutes that were found to have unconstitutionally impaired preexisting contractual obligations. At issue was the legitimacy of two statutes passed by New York and New Jersey which sought to repeal prior legislation limiting the Port Authority of New York and New Jersey's ability to subsidize rail passenger transportation from revenues and reserves pledged as security for bonds previously

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5/ The Minnesota statute applied to private employers who offered pension benefits under a plan meeting the qualifications of section 401 of the Internal Revenue Code.

issued by it. The Court held that these statutes impaired a contractual obligation of the states since they eliminated an important security provision running to the bondholders.

The literal language of the Contract Clause, which would appear on its face to proscribe "any" impairment, has been construed to allow states some latitude to enact legislation necessary "to safeguard the welfare of their citizens." *United States Trust Co.*, 431 U.S. at 21. In balancing the limitations of the Contract Clause against the necessity of the state legislation, the Court has fashioned a "hurdle" test that functions on a sliding scale:

> [T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Spannaus, 438 U.S. at 244–5 (footnotes omitted). Thus, the more severe the impairment, the higher the hurdle the state legislation must clear. In *Spannaus*, the Court noted that "[c]ontracts enable individuals to order their personal and business affairs according to their particular needs and interests" and that "[o]nce arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Id.* at 245. This Court has also pointed out that the legislation must be necessary to meet an important general social problem and it must be based "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States*

Trust Co., 431 U.S. at 22.

When these considerations are applied to the facts in this case, Act 434 must clear a high hurdle because of the severity of the impairments resulting from the Royalty Owner Exemption and the Pass-Through Prohibition. The statute nullified express terms of the Appellants' leases, sales contracts and other contracts and imposed a completely unexpected liability on the Appellants.

The high level of scrutiny accorded state legislation that produces severe impairments can be seen in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). There the state legislation passed constitutional muster, but only because the statute was necessary, reasonable under the circumstances and appropriately tailored to the emergency it was designed to meet. *Blaisdell* involved a Contract Clause challenge to a mortgage moratorium law that was enacted by Minnesota during the Depression to provide relief for homeowners threatened with foreclosure. While the legislation conflicted with the lenders' contractual rights to foreclose, the law was upheld because 1) an emergency need for the protection of the homeowner existed, 2) the state law was enacted to protect a basic societal interest, not a favored group, 3) the relief was appropriately tailored to the emergency it was designed to meet, 4) the conditions imposed were reasonable, and 5) the legislation was limited to the duration of the emergency. *Id.* at 444–47. In *Spannaus*, the Court noted that the Minnesota mortgage moritorium law in *Blaisdell* would have been invalid if any of these five enumerated factors had not been present. 438 U.S. at 242.

When the Alabama severance tax statute is examined for necessity, reasonableness and appropriate tailoring, it is clear that the legislation does not overcome the constitutional hurdle described in *Spannaus*. Act 434 was not enacted

to deal with any "emergency" situation. It was a taxing statute designed to raise revenue. One crucial factor in upholding the legislation in *Blaisdell* was the gravity of the Depression economy which made the legislation necessary. No such grave situation existed in Alabama which would have necessitated legislation that severely impaired pre-existing contractual obligations. While there is admittedly a societal interest in raising revenue by the imposition of a general tax, there is absolutely no compelling reason for enacting a tax which severely impairs preexisting contractual obligations, as was done by Act 434. In *Spannaus*, the Court struck down the Minnesota pension funding law, noting that the pension legislation "was not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions of the early 1930's". 438 U.S. at 249.

The *Blaisdell* legislation, which the Court upheld, was enacted to protect a *broad* societal interest, and "not for the mere advantage of particular individuals." 290 U.S. at 445. In *Spannaus*, the legislation, which was struck down, had "an extremely narrow focus" and could "hardly be characterized, like the law at issue in the *Blaisdell* case, as one enacted to protect a broad societal interest rather than a narrow class." 438 U.S. at 248–49. The Royalty Owner Exemption and the Pass-Through Prohibition of Act 434 do not protect any broad societal interest. These provisions have a narrow focus in that they simply specify who must bear the burden of the tax imposed. The Royalty Owner Exemption and the Pass-Through Prohibition operate "for the mere advantage of particular individuals," not for the protection of a broad societal interest.

At one point in its opinion, the Alabama Supreme Court suggested that a "conceivable reason" for the Royalty Owner Exemption was that the exemption "could encourage the development of new oil and gas wells." (J.A. 10). There is

absolutely no evidence which would support this conclusion. In fact, the opposite is true. The Royalty Owner Exemption will *discourage* production because it is the working interest owners who determine whether to drill a well. As the tax burden on the working interest owners increases, the attractiveness of drilling decreases.

The apparent purpose of the Royalty Owner Exemption is to provide the landowner/royalty owner with a lower tax burden at the expense of the oil and gas producers even though the parties had previously contracted to share the severance tax proportionately. Favoring the landowner/royalty owner is not an appropriate state reason for enacting legislation that voids preexisting contractual provisions.

The apparent purpose of the Pass-Through Prohibition is to protect consumers from price increases resulting from the increase in the tax on oil and gas. The Pass-Through Prohibition provides that "the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the *consumer.*" 1979 Ala. Acts No. 434, Section 1. (Emphasis added). Even if, arguendo, price controls are "necessary" and "serve a basic societal interest," federal regulation rather than state is the more appropriate method of implementing such controls in light of the desirability of a uniform national policy.

The Royalty Owner Exemption and the Pass-Through Prohibition are unreasonable and are not "of a character appropriate to the public purpose justifying its adoption." *United States Trust Co.*, 431 U.S. at 22. The primary purpose of Act 434 was to raise revenue. The Royalty Owner Exemption and Pass-Through Prohibition are inappropriate in meeting this public purpose since they do not raise any additional revenue. Act 434 is manifestly unreasonable because it, through the Royalty Owner Exemption and Pass-Through Prohibition, voids preexisting contractual provisions without any compelling reason for doing so.

III. THE ALABAMA SEVERANCE TAX STATUTE, WHICH DEFINES WORKING INTEREST OWNERS AND ROYALTY INTEREST OWNERS AS ONE CLASS, UNCONSTITUTIONALLY DISCRIMINATES AGAINST WORKING INTEREST OWNERS NOT ONLY BY EXEMPTING ROYALTY INTEREST OWNERS FROM PAYMENT OF THE INCREASE IMPOSED BY THE STATUTE, BUT ALSO BY TAXING WORKING INTEREST OWNERS ON THE VALUE OF PRODUCTION ATTRIBUTABLE TO SUCH ROYALTY INTEREST OWNERS, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment to the U. S. Constitution provides that "[n]o State shall. . . deny to any person. . . equal protection of the laws." "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). Moreover, when state taxation is involved, "the States have large leeway in making classifications and drawing lines which in their judgement produce reasonable systems of taxation." *Id.*

While recognizing that states have wide discretion in laying their taxes and making classifications thereunder, once a system of classification has been established, "the Fourteenth Amendment protects those within the same class against unequal taxation; all are entitled to like treatment." *Hopkins v. Southern California Telephone Co.*, 275 U.S. 393, 403 (1928). A state tax statute must "accord to all *in the same class* equality of rights." *Walters v. St. Louis*, 347 U.S. 231, 237 (1954); *Southwestern Oil Co. v. State of Texas*, 217 U.S. 114, 121 (1910).

Alabama imposed "annual privilege taxes upon every person engaging or continuing to engage within the State of Alabama in the business of producing or severing oil or gas. . . . for sale, transport, storage, profit or for use." Ala. Code §40–20–2(a) (1975). The tax is imposed on a statutorily defined class of taxpayers – "producers". The definition of producer includes working interest owners as well as royalty interest owners:

> PRODUCER. Any person engaging or continuing in the business of oil or gas production, which, for the purpose of this article, includes the owning, controlling, managing, or leasing of any oil or gas property or oil or gas well, and producing in any manner any oil or gas by taking it from the soil or waters, or from beneath the soil or waters, of the state of Alabama, *and further includes receiving money or other valuable consideration as royalty or rental for oil or gas produced* or because of oil or gas produced, whether produced by him or by some other person on his behalf, either by lease, contract or otherwise, and whether the royalty consists of a portion of the oil or gas produced being run to his account or a payment in money or other valuable consideration. (Emphasis added).

Ala. Code §40–20–1(8) (1975).

Act 434 amended the Alabama oil and gas severance tax statutes,[6/] but did not change this definition of "producer",

6/ The several statutes pertaining to severance tax are contained in Ala. Code §§40–20–1 through 40–20–13 (1975).

nor did it change the language of Section 40–20–2(a) quoted above which levied the tax on "producing or severing oil or gas." Thus, working interest owners and royalty interest owners are members of the same class of taxpayers (producers) subject to the severance tax, both before and after the Act 434 amendment. The Equal Protection Clause requires that all members of this class be accorded equal tax treatment.

This Court has noted on several occasions that it is proper to consider working interest owners and royalty interest owners as one class for severance tax purposes because both are in a "mining venture" and "have a direct and beneficial interest in the oil being produced." *Barwise v. Sheppard*, 299 U.S. 33, 37 (1936); *see also Lake Superior Consolidated Iron Mines v. Lord*, 271 U.S. 577 (1926). In *Barwise*, Texas amended its severance tax statute to tax "all interested parties including royalty interests." 299 U.S. at 35. Royalty interest owners challenged the amendment arguing that they were not actively engaged in the production of oil and that they could not permissibly be included within the class of persons subject to a tax on the "occupation" of producing oil. The Court rejected this argument, noting that working interest owners and royalty interest owners "are, in a very practical sense, committed to and engaged in a common venture for their mutual benefit." *Id.* at 39. Thus, royalty interest owners were validly included in the same class of taxpayers as working interest owners. The Court wrote:

> Without question the State has power to lay an excise on the production of oil. Here it is laid, admissibly we think, on those having a direct and beneficial interest in the oil produced and is apportioned between them according to their interests. The apportionment is reasonable, not arbitrary;

> and is as reasonable to the lessors as to the lessee.

Id. at 39.

Similar to the tax statutes in *Barwise*, the Alabama severance tax statutes provide that the tax is "levied upon the basis of the entire production in this state, including what is known as the royalty interest." 7/ 1979 Ala. Acts. No. 434, Section 1. With this statutory language, Alabama implicitly recognized that royalty interest owners and working interest owners are "committed to and engaged in a common venture for their mutual benefit" as was the case in *Barwise*. 299 U.S. at 39. Thus, not only the definition of "producer" under the Alabama severance tax statutes, but also the inclusion of the royalty interest in the tax levy clearly indicates that working interest owners and royalty interest owners are members of the same class for purposes of Alabama's severance tax.

Act 434 is unconstitutional because it arbitrarily and unreasonably imposes a substantially higher tax on working interest owners than on royalty interest owners. The Royalty Owner Exemption, together with the Pass-Through Prohibition, 8/ relieves the royalty owner of the burden of the 2% tax increase imposed by Act 434 and places the

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7/ The quoted words were present in the statute before and after the amendments enacted by Act 434. *See* Ala. Code §40–20–2(b) (1975).

8/ Inasmuch as the Pass-Through Prohibition was an exercise of police power rather than taxing power, *See Mobil Oil Corp. v. Tully*, 639 F.2d 912, 918 (2d Cir. 1981), *cert. denied*, 452 U.S. 967 (1981), the wide latitude accorded to state taxing statutes should not extend to Act 434.

burden upon the working interest owners. In effect, Act 434 requires working interest owners to pay severance taxes on royalty interest production in addition to tax on their production. As shown in the example in Argument IV, *infra* at 29-30, a working interest owner may have a tax burden substantially greater than the tax burden borne by the royalty interest owner under the same lease.

Even assuming, arguendo, that the state legislature could "sub-classify" producers to permit disparate tax treatment of working interest owners and royalty interest owners, the legislature has not done so. The definition of "producer" remained the same before and after Act 434, as did the language which levies the tax on producers of oil and gas in the first instance. The language providing that the tax is imposed on the entire production, including the royalty interest, was not changed by Act 434. Moreover, Act 434 did not change the language calling for producers to be taxed "in the proportion of their ownership." Ala. Code §40–20–3(a) (1975). These provisions established the classification of producer and revealed the object of the legislation to be an equal burden of taxation on all members of the class benefiting from engaging in the privilege that was taxed.

Further, Alabama courts cannot constitutionally interpret Act 434 as creating sub-classifications of producers. For a classification or sub-classification to be valid, it "must be reasonable, 9/ not arbitrary, and must rest upon some

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9/ The effect of the royalty owner exemption when considered in relation to other statutory provisions is to require the working interest owner to pay the tax not only on the basis of its own production, but also the 2% tax on the royalty interest production. Such a result is manifestly unreasonable.

ground of difference having a fair and substantial relation to the object of the legislation." *F. S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920). The Alabama tax is imposed on all producers engaged in the occupation of producing oil and gas. Alabama has chosen to levy the tax on all production, including the royalty interest. Under the rationale of *Barwise*, royalty interest owners and working interest owners are "engaged in a common venture for their mutual benefit." 299 U.S. at 39. They are both engaged in the occupation of producing oil and gas, and should bear the burden of any tax on production in proportion to their ownership interest in that production. There is absolutely no "ground of difference"or conceivable reason to distinguish one producer from another for severance tax purposes. 10/

While state legislatures have been granted wide latitude to create classifications in tax legislation, the latitude granted should not be so wide as to encompass such blatant and palpably unjustifiable discrimination as this. The discriminatory features of Act 434 deviate too far from the severance tax statutes approved by this Court in the past, which treat all interest holders engaged in the occupation of mining equally and impartially. In *Barwise*, the tax was levied and apportioned between the interest owners according to their proportional ownership. There, the Court said, "[t]he apportionment is reasonable, not arbitrary; and is as reason-

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10/ As has been noted, the Supreme Court of Alabama stated that a "conceivable reason" for the exemption was that the exemption "could encourage the development of new oil and gas wells." There was no evidence whatsoever to support that conclusion, and, in fact, the opposite is true. The exemption of royalty owners will discourage production because it is the working interest owners who determine whether to drill a well. As the tax burden on the working interest owners increases, the attractiveness of drilling decreases.

able to the lessors as to the lessee." 299 U.S. at 39. Act 434 is unreasonable and palpably arbitrary because it treats members of the same class unequally not only by exempting royalty owners from the 2% tax increase but also by requiring working interest owners to pay tax on royalty interest production.

IV. THE COMBINATION OF THE ROYALTY OWNER EXEMPTION AND THE PASS-THROUGH PROHIBITION OF THE ALABAMA SEVERANCE TAX STATUTE FORCES THE WORKING INTEREST OWNERS TO BEAR THE BURDEN OF THE 2% TAX INCREASE ON ROYALTY INTERESTS AND ARBITRARILY AND UNREASONABLY DISTRIBUTES THIS ADDITIONAL TAX BURDEN UNEQUALLY AMONG THE WORKING INTEREST OWNERS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

It is a recognized principle that states have wide discretion in laying their taxes and making classifications thereunder without violating the Equal Protection Clause of the Fourteenth Amendment. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522 (1959). This general rule, however, is subject to the qualification that there be equality and uniformity within each class. *Hopkins v. Southern California Telephone Co.,* 275 U.S. 393 (1928). This requirement has been interpreted by this Court to mean that a tax statute must operate alike on all persons and property similarly situated or circumstanced that belong to the same class. *Walters v. St. Louis,* 347 U.S. 231 (1954); *Southwestern Oil Co. v. State of Texas,* 217 U.S. 114 (1910).

There can be no doubt that "producers" are all members of one class for purposes of the Alabama severance tax. The severance tax is levied on the "business of producing or severing oil or gas" within Alabama. 1979 Ala. Acts

No. 434, Section 1. Producer is defined as "[a]ny person engaging or continuing in the business of oil or gas production". Ala. Code §40–20–1(8) (1975). Thus, the Alabama severance tax is levied on "producers", a statutorily defined class of taxpayers.

Even without a statutory definition, producers are properly considered one class for purposes of a state severance tax on the occupation of mining and producing minerals from the ground. *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923). In that case, lessees of mineral lands who were actively engaged in mining and producing iron ore from the lease premises were subject to a Minnesota Occupation Tax on Mining. The mining companies complained on various grounds that the classification and taxation of ore producers was invalid under the Fourteenth Amendment to the Federal Constitution. The Court held that the Minnesota tax was an occupational tax, laid "on the business of mining the ore, which consists in severing it from its natural bed and bringing it to the surface where it can become an article of commerce." *Id.* at 176–77. The tax was ruled valid when laid on those who were engaged in that business and laid on them solely because they were so engaged. *Id.* at 177. Since the Alabama severance tax is an occupation tax imposed on those granted the privilege of engaging in the occupation of producing oil and gas, those producers subject to the tax must be considered one class.

Act 434 unconstitutionally imposes differing tax rates on working interest owners subject to the Alabama severance tax. The Royalty Owner Exemption, together with the Pass-Through Prohibition, relieves the royalty owner of the burden of the 2% tax increase imposed by Act 434 and then places that burden upon the working interest owners. Thus, working interest owners pay the 2% tax increase on the royalty interest share of production in addition to the tax on their share of production. The 2% tax increase is arbi-

trarily distributed to the working interest owners depending on the size of the particular royalty interest. Following is an example which illustrates the arbitrary distribution of the tax burden under Act 434:

Example: Assume that WI_1 (working interest owner) is a producer of oil and gas in Alabama and is similarly situated in all material respects to WI_2, also a working interest owner in Alabama. R_1 is a 12.5% royalty interest owner in a lease in Alabama with WI_1. R_2 has a lease in Alabama with WI_2 calling for a 54% royalty. Assume that WI_1 and WI_2 each produces $10,000 of oil and gas during the year.

		Tax Burden		
	Share of Production	4% Tax	2% Increase	Total Tax
WI_1	$8,750	$350	$200	$550
R_1	$1,250	$ 50	$ 0	$ 50
Totals	$10,000	$400	$200	$600
WI_2	$4,600	$184	$200	$384
R_2	$5,400	$216	$ 0	$216
Totals	$10,000	$400	$200	$600

The 4% tax burden is distributed in proportion to each interest owner's share of production. The 2% tax burden is based on the total production of both the working interest owner and the royalty interest owner but is imposed solely on the working interest owner. In this example, WI_2 receives $4,600 under the lease and WI_1 receives $8,750, yet both WI_1 and WI_2 pay the same ($200) 2% tax burden. Thus, WI_2's effective tax rate is far greater than WI_1's simply because of the different royalty percentage under the particular lease as the following table indicates:

	Effective Tax Rate		
	4% Tax	2% Increase	Total Tax
WI_1	4%	2.29%	6.29%
WI_2	4%	4.35%	8.35%
R_1	4%	----	4.00%
R_2	4%	----	4.00%

The inequality and arbitrariness of Act 434 on the working interest owner class of taxpayers is apparent from the above example. WI_2 is similarly situated in all material respects to WI_1 and both are members of the same working interest owner class. Why should WI_2 have to bear an 8.35% severance tax burden, while WI_1 only bears 6.29%? There are no rational reasons for this disparate treatment. The size of the royalty interest negotiated between the lessor and lessee under a particular lease has no logical connection with the tax rate imposed. No state interest is served by imposing a greater tax burden on those producers holding leases with larger royalty interests. Consequently, there can be no argument that producers may be "sub-classified" to permit such disparate tax treatment. There is simply no

basis in fact or circumstance that would justify the arbitrary and unequal treatment of various working interest owners. Act 434 does not operate alike on all persons and property similarly situated or circumstanced that belong to the same class and, therefore, is in violation of the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons enunciated in Appellants' Argument, the decision of the Alabama Supreme Court holding that Act 434 is not in violation of the United States Constitution should be reversed and the case remanded to the Supreme Court of Alabama for reinstatement of the trial court's decision which declared the Act unconstitutional and ordered tax refunds to Appellants.

Respectfully submitted,

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No. 81-1020

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

EXXON CORPORATION, GULF OIL CORPORATION
AND
THE LOUISIANA LAND AND EXPLORATION
COMPANY

Appellants,

v.

RALPH EAGERTON, JR., as Commissioner of
Revenue of the State of Alabama, et al.

Appellees.

On Appeal From the Supreme Court
of the State of Alabama

PROOF OF SERVICE

I, LOUIS E. BRASWELL, one of the attorneys for Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of August, 1982, I served copies of the foregoing Brief of Appellants on all parties required to be served as follows:

1. On appellee herein, Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, by depositing a copy in a United States post office, with first class postage prepaid, addressed to John J. Breckenridge, his counsel of record, at 201 Administrative Building, Montgomery, Alabama 36130.

2. On all other parties to the proceeding below, by depositing copies in a United States post office, with first class postage prepaid, addressed to their respective attorneys of record, as follows:

To Rae M. Crowe, Esq., Attorney for Exchange Oil and Gas Corporation, Getty Oil Company, Placid OilCompany, Terra Resources, Inc., and Union Oil Company of California,

1101 Merchants National Bank Building
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To James R. Seale, Esq., Attorney for Anderman Operating Company, Midroc Operating Company, Pruet Production Company, and Warrior Drilling and Engineering Company, Inc.,

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To Porter, Gonzalez & Rogers, Attorneys for Petroleum Corporation of Texas,
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3. On Amici United States of America and The Federal Regulatory Commission as follows :

To Rex E. Lee
Solicitor General
Department of Justice
Washington, D. C. 20530

To A. Karen Hill
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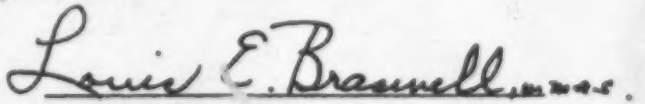

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OF COUNSEL:

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APPENDIX A

AMENDED LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES OF APPELLANTS

Pursuant to Rule 28.1 of the Rules of the Supreme Court, the Appellants herein provide the following amendment to the listing made in Appendix O of Appellants' Jurisdictional Statement naming their parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

Exxon Corporation

Exxon Corporation has no amendments to the listing made in Appendix O of Appellants' Jurisdictional Statement.

The Louisiana Land and Exploration Company

The Louisiana Land and Exploration Company amends its previous listing of subsidiaries and affiliates by adding the following: CLAM Petroleum Company.

Gulf Oil Corporation

Gulf Oil Corporation amends its previous listing of subsidiaries and affiliates by substituting the following corporations and companies for those shown in Appendix O of Appellants' Jurisdictional Statement:

GULF OIL CORPORATION
SUBSIDIARIES AND AFFILIATES

Gulf Oil Corporation lists the following subsidiaries (except wholly owned subsidiaries) and affiliates: A/S Jargul and Co. K/S; AB Djurgardsberg; Adela Investment Company, S. A.; Afran Transport Company; Agricultural Anhydrous Ammonia Co. Ltd.; Albert Rose Chemicals, Ltd.; Alberta Products Pipe Line Ltd.; Alberta Underground Storage Limited; Allied - General Nuclear Services; Andogras S. A. (Switzerland); Asia Polymer Corp.; Autobahn - Raststaette Wuerenlos Ag; Aviation Fueling Services - GT&T International Aviation Sales; Balinesian Gulf Oil Limited; Britama Tankers Limited; Britamco Limited; British Kewanee, Inc.; Canada Systems Group (EST) Limited; Cansulex Limited; Carboquimica, S. A.; Caribbean Gulf Refining Corporation; Carnduff Gas Limited; Cayman Kewanee Ltd.; The Central Pipeline Company Limited; Chicago Wire Goods Company; China Gulf Oil Company Limited; China Gulf Plastics Corporation; Chinhae Chemical Company, Ltd.; Colombian Gulf Oil Company; Colonial Pipeline Company; Commercial Alcohols Limited; Compagnie D'Investissement Combustibles De Reacteurs A Haute Temp; Compania Petrolera Aguarico, S. A.; Componentes Industriales Mexicanos, S. A.; "Condor" Industria Quimica, S. S.; Coser S. A.; Crediton Enterprises, Inc.; Delaware Bay Transportation Company; Det Gronlandske Olieaktieselskab; Dixie Pipeline Company; Eastern Gulf Oil Company Limited; Econ Oil (1977) Inc.; Emery Joint Venture; Ethyleen Pijpleiding Maatschappij (Belgium) S.A.; Ethyleen Pijpleiding Maatschappij (Nederland) B. V.; Explorer Pipeline Company; The "400" Oil Company; G & C Realty Limited; The Gaelic Oil Company Limited; GAZ Propane Blanchard Ltd.; GEA Power Cooling Systems, Inc.; General Atomic Company; General Atomic Europe - GMBH - Dusseldorf; General Atomic Europe - GMBH - Zurich; Glen Park Gas Pipe Line Company Limited; Global Energy Operations & Management Company - Inter-

national; Global Energy Operations & Management Company - Limited; Gobles Oil and Gas Limited; G. S. Equipment and General Supply; Gulf Asian Investments Company Limited; Gulf Benzin A/S; Gulf Canada Limited; Gulf Canada Petroleum Inc.; Gulf Canada Resources Inc.; Gulf Canada Resources Leasing Inc.; Gulf Chemicals International, Inc.; Gulf Ecuatoriana de Petroleo, S.A.; Gulf Europe Company; Gulf Exploration Company; Gulf Fujairah Petroleum Limited; Gulf-Gas (Sweden) Aktiebolag; Gulf International Company; Gulf International Trading - Far East; Gulf Iran Company; Gulf Italiana S.P.A.; Gulf Kuwait Company; Gulf Marine and Services Company, Limited; Gulf Minerals Canada Limited; Gulf Musandam Petroleum, Limited; Gulf Offshore Ras Al Khaimah Petroleum Limited; Gulf Oil A/S; Gulf Oil Canada - Greenland A/S; Gulf Oil Chemicals Company Asia, Limited; Gulf Oil Company (Hong Kong) Inc.; Gulf Oil Company (Nigeria) Limited; Gulf Oil Company (Portugal) Limitada; Gulf Oil Egypt Limited; Gulf Oil European Company; Gulf Oil Export Company; Gulf Oil (Great Britain) Limited; Gulf Oil (Ireland) Ltd.; Gulf Oil (Luxembourg) S.A.; Gulf Oil Mideast Trading Company; Gulf Oil (Nederland) B.V.; Gulf Oil (Nederland) Exploration and Production Company B.V.; Gulf Oil of Colombia Limited; Gulf Oil Pakistan Limited; Gulf Oil Raffinaderij B.V.; Gulf Oil Ras Al-Khaimah Limited; Gulf Oil Refining A/S; Gulf Oil Refining Limited; Gulf Oil Services, Inc.; Gulf Oil Suez Limited; Gulf Oil (Switzerland); Gulf Oil Terminals (Ireland) Limited; Gulf Oil Trading Company Limited; Gulf Oil Trading Investments Limited; Gulf Oil (U.K.) Limited; Gulf Oil Zaire S.A.R.L.; Gulf Oman Petroleum, Limited; Gulf Overseas Trading, Inc.; Gulf Petroleum, S.A.; Gulf Sales and Supply, Inc.; Gulf Supply and distribution Company Limited; Gulf Technology Europe B.V.; Gulf Transport Company Aktiebolag; Gulf U. K. Offshore Exploration Company, Limited; Gulf (U.K.) Offshore Investments Limited; Harshaw - Bryce & Co. Pty. Ltd.; Harshaw - Murata Kabushika Kaisha; Harshaw - Juarez S.A. de C.V.;

Harshaw Cabo & Cia., S.A.; The Harshaw Chemical Company; Harshaw Chemical of Canada Ltd.; Harshaw Chemicals Limited; Harshaw Chemie B.V.; Harshaw Chemie G.M.B.H.; Harshaw Chemie S.A.R.L.; Harshaw Galvanotecnia; Harshaw Holland N.V.; Harshaw International Corporation; Harshaw Nuclear Electonics Inc.; Harshaw Quimica Ltda.; Hochtemperatur Reaktorbau GMBH; Ico Pinturas, S.A.; Industrial Nickel, Inc.; Industrias Vencedor S.A.; Insco Holding & Finance Company N.V.; Insco Limited; Interprovincial Pipe Line Limited; Interquimica S.A.; Iranian Oil Participants Limited; Iranian Oil Services (Holdings) Limited; Java Gulf Limited; Kayeye Insurance Company, Ltd.; Kentucky Anfo Inc.; Kewanee Industries, Inc.; Kewanee Oil Company (U.K.) Limited; Kewanee Oil Company (U.K.) Limited Gabon; Kewanee Overseas Oil Company; Key International Drilling Co. Limited; Key Perfuracoes Maritimas Ltda.; Keydril Australia Inc.; Keydril (Nigeria) Limited; Keydril Limited; Kupan International Company; Kuwait Oil Company Limited; Kuwait Oil Company Trustees Limited; Laurel Pipe Line Company; London Oil Refining Company Limited; Mainline Pipelines Limited; Maple Insurance Limited; Mene Grande Oil Company; Michigan Stations Personnel Services; Michigan Stations, A Division of Bulk Petroleum Corporation; Mid-Atlantic Chemical Corporation S.A.; Mid-Valley Pipeline Company; Midwest Carbide Corporation; Millmaster Onyx (Canada) Ltd.; Millmaster Onyx Corporation; Millmaster Onyx G.M.B.H.; Millmaster Onyx International Corporation; Millmaster Onyx U.K.; Millmaster Onyx Western Corporation; Montreal Pipe Line Limited; Morrow Fuel Oil Sales Ltd.; Mozambique Gulf Oil Company; Nedgulf Tankers B.V.; Netherlands Kewanee, Inc.; Newfoundland Propane Limited; New Frontiers Limited; Niugini Gulf Oil Pty. Limited; North River Energy Company; Northward Development Ltd.; Northwest Propane Ltd.; Northwest Terminals Ltd.; Norwegian Gulf Exploration Company A/S; Nova, An Alberta Corporation; Oil Shippers Service, Inc.; B.V. Olie Handelsvereeniging; Oklahoma Nitrogen

Company; Pacific Gulf Oil Limited; Paloma Pipe Line Company; Panindustrial, S.A.; Peace Pipe Line, Ltd.; Pembroke Capital Company; Pembroke Cracking Company; Penrith Enterprises, Inc.; Permapint, S.A.; Petroleo Gulf do Brasil Limitada; Petroleos Gulf de Guatemala, S.A.; Petromont, Inc.; Petrosil Oil Company Limited; Plaschem International Company (Hong Kong) Limited; Plastigama, S.A.; Platte Pipeline Company; Pol Transport AB; Polyquimicos, S.A.; Produtos Quimicos Somox, Ttda.; Propet Company, Limited; Pyro Power Corporation; Raffinerie De Cressier S.A.; Redwater Water Disposal Company Limited; Resinas Andinas S.A.; Restaurang Aktiebolaget Brahehus; Rimbey Pipe Line Co., Limited; Rio Blanco Oil Shale Partnership; Ripon Enterprises, Inc.; Sarni S.P.A.; Servico Limited; Silvertown Lubricants Limited; Solvent Refined Coal International, Inc.; Sorrento Electronics, Inc.; Spencer Quimica Mexicana, S.A. de C.V.; Stibium, Inc.; Sumatra Gulf Oil, Ltd.; Sunrise International Company Limited; Superior Propane Limited; Svensk Petroleum Administration A.B.; Svensk Petroleum Largring Tre A.B.; Svenska Aktiebolaget Alfred Olsen & Co.; Svenska Gulf Oil A.B.; Svenska Petroleum Forvalting A.B.; Syncrude Canada, Ltd.; Taita Chemical Corporation; Taiwan Plasticizer Corporation; Taiwan VCM Industries Corp.; The Trans Mountain Pipe Line Company; Trans-Northern Pipe Line Company; Tunisian Gulf Exploration and Production Company; Venezuela Gulf Refining Company; Veritas Oil Company Aktiebolag; Western G.M.C. Pontiac Buick Ltd.; West Texas Gulf Pipe Line Company.

Supplemental Appellant's Brief

Office-Supreme Court, U.S.
FILED
FEB 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-1020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EXXON CORPORATION,
GULF OIL CORPORATION
AND
THE LOUISIANA LAND AND
EXPLORATION COMPANY,
Appellants,

versus

RALPH EAGERTON, JR., as Commissioner of Revenue of the State of Alabama, et al.,
Appellees.

Presentation of Newly Enacted Legislation

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INTRODUCTION

Pursuant to Rule 35.5 of the Rules of the Supreme Court of the United States, the Appellants herein (Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company), present for the Court's consideration newly enacted legislation which amends Alabama Code Section 40-20-2 (1975), the same section amended by Act 434 (the subject of this appeal).

HOUSE BILL I
(Ala. Acts No. 83-39)

Reps. Casey, Drake, Holmes, Coburn, Holley, Johnson (Roy), Preuitt, Trammell, Blake, White (L), White (F), Browder, Langford, Adams, Bowling, Layton, Harvey, Martin, Coleman, Horn, Rogers, Mathis, Mitchell, Thornton, Davis, Ashley, Grimsley, Smith, Crow, Thomas, Johnson (Al), Rice.

H. 1

Enrolled, An Act,

To amend Code of Alabama 1975, §§40-20-2 and 40-20-8, so as to delete certain exemptions and provide an eight (two percent additional) percent statewide production privilege tax and to rescind royalty owners tax exemptions so that contracts will not be impaired, to amend the allocation and distribution formula, and to provide an effective date.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Code of Alabama 1975, Section 40-20-2, is amended to read as follows:

§40-20-2. (a) There is hereby levied, to be collected hereafter, as herein provided, annual privilege taxes upon every

person engaging or continuing to engage within the state of Alabama in the business of producing or severing oil or gas, as defined herein, from the soil or the waters, or from beneath the soil or the waters, of the state for sale, transport, storage, profit or for use. The amount of such tax shall be measured at the rate of ~~six~~ eight percent of the gross value of said oil or gas at the point of production. All wells producing less than ~~40 barrels~~ 10 barrels of oil per day shall be taxed at the rate of four percent of gross value of said oil or gas at the point of production. ~~All wells that come into production after September 1, 1979, shall be taxed at the rate of four percent of the gross value of said oil or gas at the point of production for a period of 10 years after production begins. Ten years after production begins, such tax shall then be imposed at the rate of six percent on such wells that go into production after September 1, 1979, provided that said additional increase shall be limited to those oil and gas wells from 15,000 and 15,800 feet in the smackover formation.~~

(b) The tax is hereby levied upon the basis of the entire production in this state, including what is known as the royalty interest, on which production the amount of such tax shall be a lien, regardless of the place of sale or to whom sold, or by whom used, or the fact that the delivery may be made to points outside the state; and the tax shall accrue at the time such oil or gas is severed from the soil or the waters, or from beneath the soil or the waters, and in its natural, unrefined or unmanufactured condition.

(c) A county, city, town or municipality of the state of Alabama shall not establish, levy, impose or collect, as a condition of doing business or otherwise, any tax, fee, license or charge whatsoever, directly or indirectly, on or with respect to the production, treating, processing, ownership, sale, storage, purchase, marketing or transportation on any oil or gas produced in the state of Alabama and on which severance taxes have been paid to the state of Alabama, or upon the business of producing, treating, processing, owning, selling, buying, storing, marketing or transporting such oil or gas, or upon the ownership,

operation or maintenance of plants, facilities, machinery, pipelines, gathering lines or any equipment whatsoever, which are, or may be, necessary or convenient to the production, treating, processing, ownership, storage, sale, purchase, marketing or transportation of such oil or gas; provided, that nothing herein shall be construed to prohibit, limit or restrict a county, city, town or municipality from imposing and collecting ad valorem taxes on any property, real or personal, not otherwise now exempted by law; further, the limitation herein imposed upon counties, cities, towns and municipalities shall not apply to any county, city, town or municipality which does not receive a share of the severance tax under the provisions of this article.

(d) Nothing contained herein shall be deemed to limit or to enlarge the authority of a county, city, town or municipality to levy taxes or licenses on oil refining facilities located therein or on the suppliers of services or goods not including oil or gas to those persons engaging in the business of producing, treating, processing, owning, selling, buying, storing, marketing or transporting such oil or gas. ~~Any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefore.~~

(e) In all cases of production of oil from unit operations as authorized and approved by the state oil and gas board of Alabama, for purposes of computing the per well production aforesaid, the aggregate production of oil from the entire unit shall be divided by the number of wells within the unit, including injection, disposal and other wells utilized in unit operations, and the quotient therefor shall be deemed and declared to be the number of barrels of oil produced from each well in such unit regardless of the actual amount of oil per day produced from the well, if any.

Section 2. Code of Alabama 1975, Section 40-20-8, is amended to read as follows:

§40-20-8. (a) Twenty five percent of the net amount of all taxes herein levied and collected by the department,

after the same has been certified into the state treasury, shall be allocated and distributed by the comptroller to the credit of the general fund of the state.

(b) Sixty-six and two-thirds percent of the ~~net amount~~ remaining seventy-five percent of all taxes herein levied and collected by the department, after the same has been certified into the state treasury, shall be allocated and distributed by the comptroller to the credit of the general fund of the state and to the county in which the oil or gas was produced and to the municipalities therein in the proportion set out in the following schedule:

(1) Twenty-five percent of all taxes herein levied and collected on oil and gas produced from oil or gas wells located within any county, shall be allocated and distributed to each such county for county purposes or to be expended at the discretion of the county governing body. In all counties having a population of not less than 34,875 nor more than 36,000, according to the 1970 federal decennial census, such funds shall be allocated and distributed to the boards of education of the public schools in such counties on a pro rata basis as established by the number of children in net enrollment in the public schools during the prior school attendance year. In all counties having a population of not less than 16,000 nor more than 16,250, according to the 1970 federal decennial census, such funds shall be allocated and distributed as follows: Each year the first $150,000.00 shall be paid to the custodian of the county school funds, and after the payment of said $150,000.00 each year, the balance of said funds shall be divided and paid one third to the custodian of the county school funds and two thirds to the custodian of the county general funds.

(2) Ten percent of all taxes herein levied and collected on oil and gas produced from oil or gas wells located within the corporate limits or the police jurisdiction of any municipality shall be allocated and distributed to each such municipality.

(3) Fifty percent of the first $150,000.00 remaining, or any part thereof, collected per year under the provisions of this article, shall be allocated and distributed to the state, 42½percent to the county and seven and one-half percent to municipalities therein on a population basis.

(4) Eighty-four percent of all additional sums collected per year under the provisions of this article shall be allocated and distributed to the state, 14 percent to the county and two percent to municipalities therein on a population basis.

(c) Sixteen and two-thirds percent of the ~~net amount~~ remaining seventy-five percent of all taxes herein levied and collected by the department shall be certified into the state treasury to the credit of the state general fund.

(d) Sixteen and two-thirds percent of the ~~net amount~~ remaining seventy-five percent of all taxes herein levied and collected by the department on oil and gas produced from oil or gas wells located within any county shall be allocated and distributed to each such county for county purposes, to be expended at the discretion of the county governing body.

Section 3. The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 4. All laws or parts of laws which conflict with this Act are hereby repealed.

Section 5. This Act shall become effective the first of the month following the month in which it is approved by the governor.

(signed) Tom Drake
Speaker of the House of Representatives

(signed) Bill Baxley
President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in and was passed by the House January 27, 1983, as amended.

John W. Pemberton
Clerk

Senate	Jan.29 1983	Amended and Passed
House	Jan. 29, 1983	Concurred in Senate Approved Jan. 31, 1983, 2:55 P.M. (signed) George C. Wallace Governor

Respectfully submitted,

C.B. Arendall, Jr.
C. B. ARENDALL, JR.

Louis E. Braswell
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Counsel for Appellants Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company[1]

[1] The listing required by Rule 28.1 naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of appellants is contained in Appendix A of Appellants primary brief.

No. 81-1020

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

EXXON CORPORATION, GULF OIL CORPORATION
AND
THE LOUISIANA LAND AND EXPLORATION
COMPANY

Appellants,

v.

RALPH EAGERTON, JR., as Commissioner of
Revenue of the State of Alabama, et al.

Appellees.

On Appeal From the Supreme Court
of the State of Alabama

PROOF OF SERVICE

I, LOUIS E. BRASWELL, one of the attorneys for Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of February 1983, I served copies of the foregoing Presentation of Newly Enacted Legislation on all parties required to be served as follows:

1. On appellee herein, Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, by depositing a copy in a United States post office, with first class postage prepaid, addressed to John J. Breckenridge, his counsel of record, at 201 Administrative Building, Montgomery, Alabama 36130.

2. On all other parties to the proceeding below, by depositing copies in a United States post office, with first

class postage prepaid, addressed to their respective attorneys of record, as follows:

To Rae M. Crowe, Esq., Attorney for Exchange Oil and Gas Corporation, Getty Oil Company, Placid Oil Company, Terra Resources, Inc., and Union Oil Company of California,
1101 Merchants National Bank Building
Post Office Box 290
Mobile, Alabama 36601;

To Euel A. Screws, Jr., Esq., Attorney for Exchange Oil and Gas Corporation, Getty Oil Company, Placid Oil Company, Terra Resources, Inc., and Union Oil Company of California,
Post Office Box 347
Montgomery, Alabama 36101;

To Robert C. Black, Esq., Attorney for Citmoco Services, Inc.,
Hill Building
Montgomery, Alabama 36104;

To James R. Seale, Esq., Attorney for Anderman Operating Company, Midroc Operating Company, Pruet Production Company, and Warrior Drilling and Engineering Company, Inc.,
Post Office Box 2069
Montgomery, Alabama 36103;

To Macbeth Wagnon, Jr., Esq., Attorney for Alabama Gas Corporation and Alagasco Pipeline Company,
1500 Brown-Marx Building
Birmingham, Alabama 35203;

To L. Murray Alley, Esq., Attorney for Southern Natural Gas Company,
1900 First National-Southern Natural Building
Birmingham, Alabama 35203;

To Edward S. Allen, Esq., Attorney for Coronado Transmission Company,
Post Office Box 306
Birmingham, Alabama 35201;

To Porter, Gonzalez & Rogers, Attorneys for Petroleum Corporation of Texas,
1800 Guaranty Bank Plaza
Corpus Christi, Texas 78475.

3. On Amici United States of America and The Federal Regulatory Commission as follows:

To Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

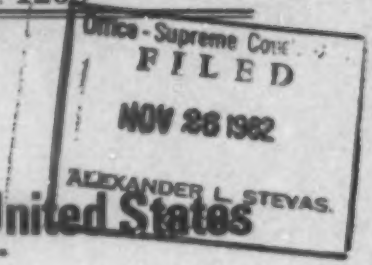
To A. Karen Hill
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

Louis E. Braswell

LOUIS E. BRASWELL
Attorney for Exxon Corporation
Gulf Oil Corporation and the
Louisiana Land and Exploration
Company

Appellee's Brief

NOS. 81-1020 and 81-1268



IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EXXON CORPORATION, ET AL., Appellants

versus

RALPH P. EAGERTON, JR., as COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, Appellee

EXCHANGE OIL AND GAS CORPORATION, ET AL., Appellants

versus

RALPH P. EAGERTON, JR., as COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, Appellee

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF OF APPELLEE

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COUNSEL FOR APPELLEE

QUESTIONS PRESENTED

1. Whether the Royalty Owner Exemption provision of the Alabama Severance Tax statute interferes with the federal regulatory scheme concerning the transportation and sale of natural gas.

2. Whether the Pass-Through Prohibition of the Alabama Severance Tax statute interferes with the federal regulatory scheme concerning the transportation and sale of natural gas.

3. Whether the Royalty Owner Exemption and Pass-Through Prohibition of the Alabama Severance Tax statute unconstitutionally impairs pre-existing contractual provisions in violation of the Contract Clause.

4. Whether the Royalty Owner Exemption and Pass-Through Prohibition of the Alabama Severance Tax statute violates the Equal Protection Clause of the Fourteenth Amendment.

5. Whether the Supreme Court of Alabama violated Appellants' rights to Due Process as guaranteed by the Constitution.

6. Whether any decision concerning the Anti-Passthrough Provision could have any prospective application.

7. Whether a decision holding invalid any portion of the Alabama Severance Tax statute would require holding the entire statute invalid.

LIST OF PARTIES TO PROCEEDING BELOW

Appellees Below:[1]

Anderman Operating Company, a corporation; Citmoco Services, Inc., a corporation; Exchange Oil and Gas Corporation; Exxon Corporation, a corporation; Getty Oil Company, a corporation; Gulf Oil Corporation, a corporation; The Louisiana Land & Exploration Company, a corporation; Midroc Operating Company, a corporation; Petroleum Corporation of Texas; Placid Oil Company; Pruet Production Company, a corporation; Terra Resources, Inc.; Union Oil Company of California; and Warrior Drilling and Engineering Company, Inc., a corporation.

Appellant Below:

Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama.

---

[1] Additional parties, Alabama Gas Corporation, Alagasco Pipeline Company, Southern Natural Gas Company and Coronado Transmission Company were parties in the trial court but did not participate in, and were not regarded as Appellees or Appellants in the proceeding before the Supreme Court of Alabama. However, they have been served with copies of this brief.

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JURISDICTIONAL BASIS OF APPEAL

Appellants obtained a declaratory judgment from the Circuit Court of Montgomery County, Alabama, that Act 79-434 (*Acts of Alabama*, 1979, p. 687) which levied an additional 2% tax on the severance of oil or gas in the State of Alabama violated the United States Constitution and the Constitution of Alabama 1901. The Supreme Court of Alabama, on July 10, 1981, entered an opinion reversing the decision of the Circuit Court and *remanding* the cause back to the Circuit Court of Montgomery County, Alabama for further proceedings. A petition for rehearing was filed by the Appellants in the Supreme Court of Alabama, which was denied by the Court on September 4, 1981. On remand, the Circuit Court of Montgomery County, Alabama entered a *Final Opinion and Judgment* dated September 30, 1981. On November 2, 1981, the Appellee, Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, filed a *Notice of Appeal* to the Supreme Court of Alabama from the *Final Opinion and Judgment* of the Circuit Court of Montgomery County, Alabama dated September 30, 1981. The Clerk of the Supreme Court of Alabama notified the Appellee Ralph P. Eagerton, Jr., that his appeal was docketed in the Supreme Court of Alabama on November 10, 1981. On November 12, 1981, Appellants Exchange Oil and Gas Corporation, Getty Oil Company and Union Oil Company of California along with several other oil companies filed a *Notice of Appeal* in the Supreme Court of Alabama. On December 1, 1981 the Clerk of the Supreme Court of Alabama notified

those Appellant oil companies that their appeal had been docketed. On February 4, 1982, Appellants Exchange Oil and Gas Corporation, Getty Oil Company, and Union Oil Company of California filed with the Clerk of the Supreme Court of Alabama a *Motion to Dismiss Cross Appeal* asking that their notice of appeal be dismissed by the Supreme Court of Alabama. On February 16, 1982, the Supreme Court of Alabama dismissed the cross-appeal of the Appellant oil companies. The appeal of the Commissioner of Revenue was submitted to the Supreme Court of Alabama upon briefs of the parties and oral argument on May 11, 1982. In their briefs and in oral argument before the Supreme Court of Alabama, the Appellants Exchange Oil and Gas Corporation, Getty Oil Company and Union Oil Company of California raised many of the same issues they are raising in the present appeal now before this Court. As of the present date, the Supreme Court of Alabama has not issued its decision concerning the appeal of the Commissioner of Revenue and cross appeal of the oil companies. Therefore, the Appellee, Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, submits that the judgment appealed from by the Appellants in the present action is not a "final judgment or decree" as required by Title 28, U.S.C. §1257(2) and as alleged by the Appellants in the present action, and therefore this Court lacks jurisdiction to entertain said appeal. It is incomprehensible to the Appellee that this point has been overlooked by the Court in view of the many decisions of this Court holding that a remandment to the trial court does not constitute a "final judgment or decree" as required by Title 28, U.S.C.

§1257(2). To allow Appellants Exchange Oil and Gas Corporation, Getty Oil Company and Union Oil Company of California to be in both the Supreme Court of Alabama and the Supreme Court of the United States arguing the same decision at the same time seems inconceivable, but is the truth and fact of the matter.

STATEMENT OF THE CASE

Appellants are various oil companies engaged in the business of severing oil and gas from beneath the soil or waters of the State of Alabama. The Appellants brought numerous actions in the Circuit Court of Montgomery County, Alabama for the purpose of challenging the constitutionality of an oil and gas severance tax statute enacted by the Legislature of Alabama as Act 79-434. The Act was in effect from September 1, 1979 until May 28, 1980. During the effective period of the statute, the Appellant Oil Companies paid the tax levied by Act 79-434 under protest and filed suits for declaratory judgment seeking either a refund of taxes paid under protest because of the alleged unconstitutionality of the Act, or a declaration from the trial court that they should be allowed to pass the tax on to their customers. All of the actions brought by the various oil companies were consolidated for trial. On June 12, 1980, the trial court ruled in favor of the Appellant Oil Companies, and held Act 79-434 unconstitutional under both the Constitution of Alabama 1901 and the United States Constitution, as well as the laws of the United States.

On June 30, 1980, the Appellee Commissioner of Revenue filed a Notice of Appeal to the Supreme Court of Alabama with the trial court, and, after briefs and oral arguments by the parties were presented, the Supreme Court on July 10, 1981, *reversed* the decision of the trial court *and remanded* the cause back to the circuit court for further action.

The Appellant Oil Companies filed applications for rehearing with the Supreme Court of Alabama and an Order was entered on September 4, 1981, by the Supreme Court of Alabama denying the applications for rehearing by the oil companies.

On remand, the Circuit Court of Montgomery County, Alabama entered a *Final Opinion and Judgment* dated September 30, 1981. On November 2, 1981, Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama filed a *Notice of Appeal* to the Supreme Court of Alabama from the *Final Opinion and Judgment* of the Circuit Court of Montgomery County, Alabama dated September 30, 1981. The appeal of the Commissioner of Revenue was docketed in the Supreme Court of Alabama on November 10, 1981. On November 12, 1981, Exchange Oil and Gas Corporation, Getty Oil Company, and Union Oil Company of California filed their *Notices of Appeal* cross-appealing the *Final Opinion and Judgment* of the Circuit Court of Montgomery County, Alabama dated September 30, 1981. On December 1, 1981, the Clerk of the Supreme Court of Alabama notified those oil companies in the Supreme Court of Alabama that their appeal had been docketed. On Feburary 4,

1982, the attorneys representing Exchange Oil and Gas Corporation, Getty Oil Company, and Union Oil Company of California filed a *Motion to Dismiss Cross Appeal* with the Clerk of the Supreme Court of Alabama along with a *Motion to Dismiss Appeal* of the decision of the Circuit Court of Montgomery County, Alabama, issued on remand dated September September 30, 1981. On February 16, 1982, the Supreme Court of Alabama granted the Motion of Exchange Oil and Gas Corporation, Getty Oil Company and Union Oil Company of California and entered an Order dismissing those oil companies' cross-appeal of the decision entered by the Circuit Court of Montgomery County, Alabama on remand. The Supreme Court of Alabama refused to grant the oil companies Motion to Dismiss the Commissioner's appeal.

The appeal of the Commissioner of Revenue from the decision of the Circuit Court of Montgomery County, Alabama as well as the cross-appeals and motions to dismiss by the Oil Companies were submitted to the Supreme Court of Alabama on briefs and oral arguments of the parties on May 11, 1982. As of the present date, the Supreme Court of Alabama has still not issued any opinion or decision as to the correctness of the *Final Opinion and Judgment* on remand of the Circuit Court of Montgomery County, Alabama dated September 30, 1981.

THE FACTS

The Appellants are oil companies engaged in oil and gas production in Alabama. In addition, some of

the oil companies are also operators of production units and are also royalty owners.

The oil companies all have contracts with other parties which may obligate the other parties to be responsible for, or to make reimbursement for, severance taxes. These contracts were the subject of a stipulation between the parties in the trial court. (J.A. 76.)

The challenged Alabama Severance Tax statute imposed an oil and gas severance tax increase from 4% to 6% upon all persons engaged in the business of severing oil or gas from beneath the soil or waters of the State of Alabama. The Appellants have paid the 2% increase under protest to the State of Alabama from September 1, 1979, the effective date of the Act, until May 28, 1980, the date the Act was superseded.

SUMMARY OF ARGUMENT

The Royalty Owner Exemption Provision contained in Act 79-434, Acts of Alabama does not interfere with the federal regulatory scheme concerning the transportation or sale of natural gas since royalty owners are not considered customers of working interest owners. Nothing in the federal regulatory statutes concerning the transportation or sale of natural gas states that producers of natural gas are allowed or required to recover state severance taxes from royalty interest owners. The state governments have a broad discretionary authority to classify for exemption as well as taxation purposes.

The Pass-Through Prohibition of the Alabama Severance Tax Statute does not interfere with the federal regulatory scheme concerning the transportation and sale of natural gas since the federal regulatory scheme specifically provides that the seller of natural gas who makes the first sale may include in the lawful maximum price an amount necessary to recover state severance taxes and nothing in the Alabama Severance Tax Statute precludes the natural gas producers from raising their maximum price for the natural gas. The Alabama Severance Tax Statute only prohibits the severance tax from being passed on as a tax, and this provision is not in conflict with any federal statute.

The Royalty Owner Exemption and the Pass-Through Prohibition of the Alabama Severance Tax Statute do not unconstitutionally impair pre-existing contractual provisions in violation of the Contract Clause of the United States Constitution since a contract between private parties can in no way limit a state's sovereign power to levy taxes or to select upon whom those taxes shall fall.

The Royalty Owner Exemption and the Pass-Through Prohibition of the Alabama Severance Tax Statute do not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution since it is well recognized that states have broad power and leeway in the classification for taxation purposes. The distinctions contained in the Alabama Severance Tax Statute are entirely rational and not unreasonable and thus do not violate the Equal Protection Clause.

The decision of the Supreme Court of Alabama has not violated the Appellants' rights to due process as guaranteed by the United States Constitution because the Supreme Court of Alabama refused to consider clearly inadmissible evidence offered by the oil companies. Simply because the opinion of the Supreme Court of Alabama did not result in a decision favorable to the Appellants does not mean that the Appellants' rights to due process were violated.

Any decision concerning the Anti-Passthrough Provision cannot have any prospective application due to the fact that the provisions of the Emergency Petroleum Allocation Act of 1973 have already expired and the latest decision of the Alabama court is to the effect that the Alabama Severance Tax Statute in question does not increase the severance tax on the production of natural gas. Futhermore, the Anti-Passthrough Provision of the Alabama Severance Tax Statute was superseded on May 28, 1980 and is no longer in existence. Thus the controverted provision of the statute is no longer in existence.

A decision holding invalid a portion of the Alabama Severance Tax Statute would not necessitate invalidating the entire statute since the statute contains a severability clause and in the event any portion of the statute should be declared invalid the remaining portions of the statute are to be given full force and effect.

ARGUMENT

THE ROYALTY OWNER EXEMPTION PROVISION OF THE ALABAMA SEVERANCE TAX STATUTE DOES NOT INTERFERE WITH THE FEDERAL REGULATORY SCHEME CONCERNING THE TRANSPORTATION AND SALE OF NATURAL GAS.

The Appellant Oil Companies contend that the royalty owner exemption provision of the Alabama Severance Tax statute interferes with the federal regulatory scheme concerning the transportation and sale of natural gas by violating provisions of the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301 *et seq.* As stated by the Appellants, the Natural Gas Policy Act of 1978 "imposed a maximum lawful price on the first sale of all production of natural gas, and provided that the seller's recovery of state severance taxes would not cause a sales price to exceed the maximum lawful price." The "Royalty Owner Exemption" in the Alabama Severance Tax statute referred to by the Appellant Oil Companies was contained in Section 1(d) of Act 79-434 (amending §40-20-2(d), *Code of Alabama 1975)* and provided: "any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefore."

As conceded by some of the Appellants, it is well recognized that "when state taxation is involved, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake*

Shore Auto Parts Co., 410 U.S. 356, 359 (1973). "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others." *Id.*

In the case of *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937), this Court stated the rule as follows:

> It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. (Citations omitted.) This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. (Citations omitted.)
>
> Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. (Citations omitted.)

Therefore the rule in America has long been recognized that not only do States have a wide discretion in matters of levying a state tax, but they have an equally wide latitude in determining exemptions from state taxation. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis. The Legislature of Alabama was well within its lawful authority to exempt royalty owners from the payment of the increase in the Alabama Severance Tax levied by Act 79-439. This was a matter of legislative discretion that is solely the prerogative of the Legislature of Alabama and should not be overturned without a clear showing that no rational basis exists for the distinction adopted by the Legislature. The oil companies argument that the Alabama Legislature's treatment of royalty owners differently from working interest owners is a violation of the Fourteenth Amendment simply overlooks the fact that legislative bodies are empowered to make such distinctions. The Commissioner submits that the crux of the oil companies' argument is that it seems unfair that for purposes of the 4% Alabama Severance Tax royalty owners are included within the definition of "producers", but for the additional 2% increase in the severance tax levied by Act 79-434 they are exempt from the payment of the increase. What the oil companies fail to see is that since September 1, 1979 there is a two tier tax on the severance of oil and gas in the State of Alabama. The first tier comprises the 4% severance tax in effect since 1945. For the purposes of the 4% first tier of taxes, the Commissioner concedes that a royalty owner is included within the definition of a

"producer" and the royalty owner's interest is subject to taxation and can be paid by the royalty owner himself or deducted from the royalty owner's payment by the person in charge of production operations. Clearly the Legislature was well within its authority to treat the royalty owner's interest the same as any other owner's interest for the purposes of severance tax. As conceded by the oil companies, this power of the legislature was recognized by this Court in *Barwise v. Sheppard*, 299 U.S. 33 (1936), and is not being contested in this present action. However, for the 2% second tier of Alabama Severance Tax, the Legislature, in its wisdom and discretion, decided to exempt "any person who is a royalty owner from the payment of any increase in taxes" levied by Act 79-434. Just as the oil companies must recognize the Legislature's inherent power to classify for *taxation* purposes, they must also recognize the concomitant power to classify for purposes of *exemption*. The fact that the oil companies resent royalty owners being required to pay the 4% tax but are exempt from the 2% tax does not make the exemption any the less valid. The test of classifications for taxation (or exemption) purposes must be whether the classifications are rational. So long as there exists any rational basis for the classification, the classification should not be overturned. Since it is the Appellants who are attacking the constitutionality of the classification of royalty owners differently from other interest owners, it is incumbent upon the oil companies to rule out every rational distinction. This, the Commissioner submits, would be impossible for the oil companies to do, since the trial court opinion that the oil companies are asking this

Court to reinstate recognized such distinctions. For example, in the event of a successful operation the royalty owner receives benefits but bears no burden for a possible loss in the event of a nonsuccessful operation. In addition, the Commissioner submits that by exempting the royalty owner from the payment of the increase in the severance tax the Legislature of Alabama could have been attempting to encourage investment in the search for oil and gas resources in the State of Alabama, and this would be a legitimate purpose. Finally, this Court, in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 511 (1937), held:

> Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for the difference between the treatment of small incomes or small taxpayers and that meted out to others.

Thus the Commissioner submits that the Legislature of Alabama could have intended to encourage investment in the oil and gas industry in the State of Alabama and may have decided to insure administrative convenience and accuracy of reporting by requiring the person in charge of drilling operations to bear the entire 2% increase in the severance tax. This the Commissioner submits is not an irrational aim and the exemption should not be overturned as a violation of the Equal Protection Clause.

The case of *Barwise v. Sheppard*, 299 U.S. 33 (1936), does not mandate that working interest

owners and royalty interest owners must be treated as one class for severance tax purposes, as the Appellants have argued, but simply provides that States have the inherent power to make reasonable classifications for the purposes of oil and gas severance taxation. This Court, in *Barwise*, did not mandate that Alabama's severance tax scheme must be the same as that of Texas.

Since, as the oil companies have conceded, the purpose of the present federal regulatory scheme concerning the transportation and sale of natural gas is to allow the natural gas owners to recover from their customers all legitimate costs associated with the production, processing, and transportation of natural gas, the Commissioner of Revenue is at a loss to understand how the oil companies can maintain that the royalty owner exemption contained in the Alabama Severance Tax Statute is in conflict with the federal scheme. Clearly the royalty owners are not the customers of the producers. Neither the Natural Gas Policy Act of 1978, 15 U.S.C. §§3301 et. seq., nor the Natural Gas Act, 15 U.S.C. §§717 et seq. prohibit exempting the royalty owners interest from State severence taxes. Neither of these federal statutes are concerned with allowing working interest owners to deduct their costs from royalty interest owner's shares. The federal statutes mentioned by the oil companies are concerned solely with whether natural gas owners who make the first sale of natural gas are entitled to include in their lawful maximum price an amount necessary to recover state taxes from subsequent purchasers of the natural gas. The Commissioner is at a loss to

understand the oil companies arguments that royalty interest owners should be treated as customers of the working interest owners. The oil companies are not selling their natural gas to royalty owners. Therefore, since as the oil companies have argued the entire federal regulatory scheme is directed towards the production, processing and transportation of natural gas in both interstate and intrastate commerce, and since royalty interest owners can in no way be considered purchasers of the natural gas, then the Commissioner of Revenue submits that the arguments of the oil companies that the Royalty Owner Exemption Provision contained in the Alabama Severance Tax Statute interferes with the federal regulatory scheme and is violative of the Supremacy Clause Art. 1, §10, cl. 1 of the United States Constitution is without merit or substance.

II

THE PASS-THROUGH PROHIBITION OF THE ALABAMA SEVERANCE TAX STATUTE DOES NOT INTERFERE WITH THE FEDERAL REGULATORY SCHEME CONCERNING THE TRANSPORATION AND SALE OF NATURAL GAS

At the outset it should be noted that Appellants Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company are making no contentions before this Court that the Alabama Severance Tax statute is preempted by the Emergency Petroleum Allocation Act, 15 U.S.C. §751, *et seq.* (See Footnote 4, page 12, Brief of Appellants Exxon, Gulf and LL & E).

The Appellants have alleged that the Pass-through Prohibition of the Alabama Severance Tax statute violates provisions of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3301 *et seq.* As conceded by the Appellants, the purpose of the Natural Gas Policy Act of 1978 was to "impose a maximum lawful price on the first sale of all production of natural gas and to provide that the seller's recovery of state severance taxes would not cause a sales price to exceed the maximum lawful price." Section 110(a)(1) of the NGPA, 15 U.S.C. 3320(a)(1), provides:

> A price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extent necessary to recover (1) State severance taxes attributable to the production of such natural gas and borne by the seller ...

Section 110(a)(1) of the NGPA allows the seller who makes the first sale of natural gas to include in the lawful maximum price an amount necessary to recover State severance taxes applicable to the production of the natural gas. It is the position of the Commissioner of Revenue that Act 79-434 does not conflict with §110(a)(1) of the NGPA. The Commissioner believes that the seller may include in the lawful maximum price an amount equal to Alabama's severance taxes borne by the seller resulting

from the production of natural gas. The Commissioner believes that it was the intent of the Alabama Legislature in adopting the pass-through prohibition that it did not want to be perceived as levying an additional tax on the consumer. Therefore it prohibited anyone from passing along the increase levied by Act 79-434 *as a tax*. As authority for the Commissioner's position, it should be pointed out that the Supreme Court of Alabama in its Opinion reached the same conclusion. As the Alabama Supreme Court explained (J.A. 12):

> The two Acts are aimed at entirely different purposes. In other words, although it would be perfectly permissible for the oil and gas companies to raise the price for the first sale of natural gas, subject to the limitations of the Natural Gas Policy Act, all that Act No. 79-434 requires is that the increase in severance tax mandated by that act be borne by the producer or severer of the oil or gas. Thus, the pass-through prohibition contained in Act No. 79-434 does not conflict with the Natural Gas Policy Act of 1978, and the trial court's finding to that effect is due to be reversed.

Therefore the Commissioner believes it would be perfectly permissible for the seller to include in the maximum lawful price of the first sale of natural gas the increase attributable to the tax levied by Act 79-434, so long as the increase was not specifically

set out as a tax to be passed along. The Commissioner believes that the Legislature of Alabama, as well as the Supreme Court of Alabama, realistically understood that the consumer would ultimately bear the increase. However, for whatever political reasons the Legislature might have had, it is the position of the Commissioner of Revenue that the Legislature of Alabama did not want to be perceived as levying a "consumer tax".

The Commissioner would also point out that §110(a)(1) of the NGPA specifically requires that the seller may include in the maximum lawful price only those State severance taxes *borne by the seller* as the result of the production of such natural gas. Thus the requirement of Act 79-434 that the severance tax must be borne by the producer or severer of the oil or gas could in no way be in conflict with the provision of the NGPA that requires the first seller of the natural gas to bear the State severance tax in order to include such tax in the lawful maximum price. In the requirement that the severance tax be borne by the producer or the severer of the oil or gas, Act 79-434 and §110(a)(1) of the NGPA dove-tail exactly.

It should also be noted that the argument of the Appellants as well as that of the Amicus is based upon the premise that: "Under the Alabama scheme, however, a producer that was already charging the maximum lawful price for its gas would not have been allowed to recover the increased severance tax from the purchaser." (Page 5 of the Amicus Curiae Brief.) The Commissioner would like to point out

that nowhere in the volumes and volumes of the record involved in this case is there one word or sentence that would prove or tend to prove that any of the Appellants or oil companies involved in either the trial or the subsequent appeals is or was charging the maximum lawful price during the applicable period. Neither the Supreme Court of Alabama nor the United States Supreme Court should be called upon to rule as to some speculative injury that may or may not ever have occurred.

III

THE ROYALTY OWNER EXEMPTION AND THE PASS-THROUGH PROHIBITION OF THE ALABAMA SEVERANCE TAX STATUTE DOES NOT UNCONSTITUTIONALLY IMPAIR PRE-EXISTING CONTRACTUAL PROVISIONS IN VIOLATION OF THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION.

The Supreme Court has time and again construed the contract clause of the Constitution of the United States and held that the parties to a private contract can not limit a State's ability to levy taxes or to select upon whom those taxes shall fall. *Lake Superior Consol. Iron Mines, v. Lord,* 271 U.S. 577 (1926); *United States Trust Co. of New York v. New Jersey,* 431 U.S. 1 (1977). Every tax levied in some respect affects a contract right of some individual. Thus, the contract clause may not be literally construed. There is an obvious limitation which would reserve to a State the right to exercise its sovereign power of taxation.

The case of *Barwise v. Sheppard*, supra, is firm support for the proposition that Alabama's Severance Tax statute does not violate the contract clause of the U.S. Constitution. In a similar situation, this Court considered the implications of a Texas statute levying a gross production tax upon the production of oil. The Texas taxing statute was changed so that the tax should be borne ratably by all interested parties including royalty interest owners and not just the lessees (working interest owners). The royalty interest owners objected to the change on the basis that prior leases required the lessee to deliver to the royalty interest "free of cost." While presuming this language in the lease also referred to taxes, this Court stated as follows:

> But, be this as it may, the lease was made in subordination to the power of the State to tax the production of oil and to apportion the tax between the lessors and the lessee. The taxing act does not purport to reach or affect any term of the lease. Plainly no stipulation in the lease can be of any avail as against the power of the State to impose the tax, prescribe who shall be under a duty to the State to pay it, and fix the time and mode of payment. And this is true even though it be assumed to be admissible for the lessors and lessee to stipulate as to who, as between themselves, shall ultimately bear the tax. These views are but a reiteration and application of what repeatedly has been

held in respect of contracts and their subordination to the taxing power. (footnote and citations omitted.)

It is true that the law in force when the lease was made and for some years thereafter laid a production tax on the lessees alone, and it is equally true that under the act of 1933 a part of the tax is imposed on the lessors and the part imposed on the lessee is less than what would fall on him under the earlier law. But the State's power in the matter was in no way circumscribed by the earlier law. That law was subject to change at any time through a further exertion of the taxing power; and the lease presented no obstacle to such a change.

It follows that appellant's reliance on the contract clause of the Constitution is ill-grounded.

299 U.S. at 40-41.

Thus, the rule established in *Barwise* is that the State may impose a tax and designate who is required to account for and remit the tax to the State. The Pass-Through Prohibition of the Alabama Severance Tax statute is without doubt a prescription by the Alabama Legislature as to who is under a duty to account for the tax.

The incidence of the tax is made clear by the Pass-Through Prohibition that it is upon the Appellant oil companies who do the actual severing of the oil and gas. It is not to be construed in any manner as a consumer tax. As stated in the case of *United States Trust Company of N. Y. v. New Jersey*, 431 U.S. 1 (1977):

> The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from the state regulation by making private contractural arrangements. This principle is summarized by Mr. Justice Holmes' well-known dictum: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." (footnote and citation omitted.)
>
> 431 U.S. 1 at 22.

The Legislature of Alabama is the proper body to set State economic policy and should not in any way be limited or bound by what private parties may contract between themselves. Thus, it is only reasonable that the Legislature should not be restricted by contracts between private parties in its sovereign power to tax. The functions of levying and administration of a tax should not be relinquished to

the oil companies but should reside in the Legislature. As a concomitant of the State's taxation power, the Legislature must also retain the authority to determine who shall bear the burden of such taxes without regard to any contractual arrangements between private parties, so long as the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.

IV

THE ROYALTY OWNER EXEMPTION AND THE PASS-THROUGH PROHIBITION OF THE ALABAMA SEVERANCE TAX STATUTE DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Oil Companies have alleged that the Royalty Owner Exemption and the Pass-Through Prohibition violate the Equal Protection Clause of the Fourteenth Amendment because Act 79-434 treats royalty owners differently from working interest owners. At least Appellants Exxon Corporation, Gulf Oil Company, and Louisiana Land and Exploration Company have had the candor to admit that in matters of taxation state governments have a wide discretion and leeway in levying their taxes and making classifications for taxation purposes. It is interesting to note that all of the Appellants have recognized that there are at least two sub-classes of ownership over the production of oil or gas. All of the Appellants recognized that royalty interest owners and working interest owners are different sub-classifications within the definition of "producers".

In the case of *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U.S. 527, 537, 538, (1931), this Court held:

> The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. (Citations omitted.) The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, (Citation omitted), or if any state of facts reasonably can be conceived to substain it. (Citations omitted.)
>
> * * * * * *
>
> It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain

> the classification adopted by the Legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear.

The Commissioner submits that it is well within the discretion of the Legislature of Alabama to apportion the tax as between the royalty interest owner and the working interest owner and such apportionment should not be set aside by this Court absent proof positive that no conceivable set of circumstances would justify the distinctive treatment. In the case of *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 533, (1933) this Court also said:

> It is needless to repeat what was said in the Jackson case to the effect that the difference between the subjects taxed need not be great, and that, if any reasonable distinction can be found, the duty to the court is to sustain the classification embodied in the law.

The Commissioner contends that as long as any conceivable reason exists in support of the classification then the courts are under a duty to uphold the classification as reasonable and not violative of the Equal Protection Clause. The Commissioner submits that there do exist several very probable reasons for the classification set up by the Alabama Legislature, such as encouragement of investment by royalty owners, efficient administration and col-

lection of the tax, as well as other reasons. Therefore the Commissioner submits that there does exist a reasonable basis for the treatment of the royalty owners' portion of the production of an oil or gas well differently from a working interest owner's portion and thus the statute should be upheld as not violative of the Equal Protection Clause.

V.

THE DECISION OF THE SUPREME COURT OF ALABAMA HAS NOT VIOLATED THE APPELLANTS' RIGHTS TO DUE PROCESS AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

In their argument that the decision of the Supreme Court of Alabama denied the Appellants due process of law, Appellants Exchange, Getty and Union have made several statements that border on the absurb.

At page 17 of their brief, Appellants Exchange, Getty and Union have made the following statement:

> In this case, every party in any manner involved with Act 434, including the Appellee Department of Revenue, knows, with certainty, the true, absolute and uncontradicted intent of the Alabama Legislature in enacting Act 434. The true legislative intent was to increase the Alabama Severance Tax

> by two percent on certain wells located in Escambia County (Smackover Wells between 15,000 and 15,800 feet). *There is not a word of testimony or a single document to the contrary.*
>
> *The true intent is undisputed. . . .*
>
> (Emphasis in the original)

The Commissioner disagrees strongly with the above statements of the oil companies. It should be obvious to anyone that has eyes to see that the intent of Act 434 was strongly disputed by the parties. From the outset the Department of Revenue took the position that Act 434 was a general law of statewide application. It is also equally obvious that the oil companies took the position that Act 434 was a local act that aplied only to Escambia County, Alabama.

On page 18 of the *Exchange* Brief, the oil companies continue to misstate the true facts of this case:

> We repeat: The *true* legislative intent is undisputed. The Appellee did not dispute, in the trial court, the testimony of these ten witnesses, or the contents of these eight sets of documents. Rather, the Appellee simply sought to have the Alabama Supreme Court decide, in spite of the true, obvious and uncontroverted legislative intent, that the Act should nevertheless be held to apply state-wide and the Alabama Supreme

> Court obliged. (Emphasis is in the original.)

The Commissioner submits that Appellants Exchange, Getty and Union are refusing to recognize that the incompetent and hearsay testimony that they choose to label "legislative history" is inadmissible as evidence in a court of law. The fact that these oil companies continue to choose to mislabel rank hearsay testimony and the conclusions of obviously incompetent witnesses does not magically transform such testimony into admissible evidence acceptable in a court of law. Over and over throughout their brief, these oil companies continue to repeat the refrain that their version of the "true legislative intent" of Act 434 is undisputed, and this is simply not so.

The Commissioner can only reply that no matter how many times the oil companies make this misstatement it will not change the fact that the "true legislative intent" of Act 434 must be determined from the language of the statute itself and in no event should it be determined by considering the inadmissible snake oil they choose to palm off as "legislative history." The Commissioner does not believe that he could improve significantly upon the pronouncement of the Alabama Supreme Court on this point:

> The manifested intent of the Legislature, as stated in the Act itself, was to levy this tax upon "every person engaging or continuing to engage within the

State of Alabama in the business of producing or severing oil or gas. . . ." This is a clear and unambiguous statement that the Legislature intended for the tax increase to apply statewide. Moreover, Act No. 79-434 specifically replaces and amends Code of 1975, §40-20-2 which imposed a 4% severance tax statewide. If this Act were interpreted as applying only to those wells in the smackover formation at the specified depth, and only in Escambia County, there would be no provision for taxing the rest of the state. Certainly this was not the intent of the Legislature

After a careful reading of the Act, we are convinced that the smackover provision should logically be read in conjunction with the preceeding sentence and should only be construed as a limitation on the taxing of new wells. *Although the Appellees put forth various forms of extrinsic evidence, some of which was clearly inadmissible, in order to prove the intent of the legislature, the general rule is that when the intent of the legislature can be determined from the language of the statute itself, we do not need to resort to extraneous matters to determine the legislative intent.* "Courts can only learn what [the] Legislature intended by what it has said, and have no right to stray into mazes of

> conjecture or search for an imaginary purpose, in construing [a] statute. Alabama Industrial Bank v. State ex rel. Avinger, 286 Ala. 59, 237 So.2d 108 (1970). We are thus compelled to find that the smackover provision was not intended by the legislature to be a limitation which affected the entire Act." (Emphasis supplied.)
>
> (J.A. 6-7.)

Rejecting the oil companies' offer of "clearly inadmissible" evidence and making its determination as to the intent of the Legislature from the language of the statute itself can hardly be termed a denial of due process to the Appellants. Surely these oil companies must realize that their contention is in direct conflict with the well-recognized principle of statutory construction as enunciated by the Supreme Court of Alabama. At page 19 of their brief these oil companies have made the following statement:

> There is not a reported decision in American jurisprudence known to these Appellants which holds, or even intimates, that a court should wear blinders and plow down the row, looking neither left nor right, to speculate on the meaning of some ill-drafted phrases and reach what *everyone* knows is the exact opposite of what the Legislature intended.

These oil companies are arguing that because the Supreme Court of Alabama followed the well-recognized rule of statutory interpretation "that when the intent of the Legislature can be determined from the language of the statute itself, then courts have no right to resort to extraneous matters to determine the legislative intent or to stray into mazes of conjecture and search for an imaginary purpose in construing a statute," then this amounted to a denial of the Appellants' due process rights. The oil companies' arguments that the Supreme Court of Alabama should have ignored the well-recognized rules of statutory interpretation and should have "looked to the left and to the right to speculate on the meaning of some ill-drafted phrases" is of course ridiculous on its face. Surely these oil companies must recognize that the best and only evidence of what the Legislature intended when it enacted a particular statute is the language used by the Legislature in the statute itself.

The Commissioner urges this Honorable Court to keep in mind that the "evidence" that these oil companies have labeled "legislative history" is not "legislative history," but is in fact inadmissible conclusions, opinions and third-hand hearsay that were palmed off by these oil companies under the guise of being "legislative history." The Commissioner submits that for the Alabama Supreme Court to have considered such inadmissible evidence would have in fact been a denial of a fair trial and due process to the Commissioner. To the Supreme Court of Alabama's credit they rejected the spurious arguments of these oil companies concerning their "offer of proof."

At page 24 of their brief these oil companies complained:

> The Alabama Supreme Court rejected all extrinsic evidence of legislative intent, finding that the "manifested intent of the Legislature, as stated in the Act itself . . . [was] clear and unambiguous . . . [and] that the Legislature intended for the tax increase to apply statewide."

The Commissioner fails to understand how these oil companies can rationally make such an unreasonable argument. Surely if the intent of the Legislature was manifested in the language of the statute itself then that should be the end of the matter. The oil companies are not arguing that the intent of the Legislature was not manifested in the language of the statute itself, but are arguing that the Supreme Court of Alabama should have considered extrinsic evidence to arrive at the interpretation they recommended. This is of course ridiculous. Surely this Honorable Court must realize that the Alabama Supreme Court, the highest court in the State of Alabama, is the most competent court to decide whether an act of the Alabama Legislature constitutes a local act or a general act of statewide application. The argument that: "The Alabama Court's duty to hew the intention of the legislature as 'the pole star of interpretation of statute,' (citation omitted), cannot be avoided by a claim that the statute is clear on its face" is of course ridiculous. (Exchange Brief, page 25.) Surely if the statute is clear on its

face then there can be no argument as to the meaning of the statute. The Commissioner fails to understand how these oil companies can sanely argue that if the statute is clear on its face then the courts have a duty to search for other interpretations.

VI.

ANY DECISION CONCERNING THE ANTI-PASSTHROUGH PROVISION CANNOT HAVE ANY PROSPECTIVE APPLICATION.

In the recent case of *Tully v. Mobil Oil Corp.*, 102 S.Ct. 1042, decided February 22, 1982, this Court ruled:

> The normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision. (Citations omitted.)
>
> The expiration date for the federal statute has come and gone; the only barrier to the enforcement of the anti-passthrough provision no longer exists.
>
> 102 S.Ct. 1047 at 1048.

Appellants Exchange, Getty and Union are making the same exact arguments concerning the provisions of the Emergency Petroleum Allocation Act of 1973 that Mobil Oil made in *Tully v. Mobil Oil Corp.*, *supra*. Clearly the arguments of Exchange, Getty and Union that the anti-passthrough provisions of

Act 434 is barred by the Emergency Petroleum Allocation Act of 1973 is due to be rejected based upon this Court's decision in *Tully v. Mobil Oil Corp.*, supra. As previously stated Appellants Exxon Corporation, Gulf Oil Corporation and the Louisiana Land and Exploration Company are making no contentions before this Court that the Alabama Severance Tax statute is preempted by the Emergency Petroleum Allocation Act of 1973. (see Footnote 4, page 12, Brief of Appellants' Exxon, Gulf and Louisiana Land and Exploration.)

In addition, the Commissioner has appealed the decision of the trial court on remand that Act 434 does not increase the severance tax on natural gas production in the State of Alabama, and Appellants' Exchange, Getty and Union are presently arguing before the Supreme Court of Alabama that the decision of the trial court to the effect that natural gas production in Alabama is exempt from the increase levied by 434 should be upheld. Therefore, it is the position of the Commissioner of Revenue that, until the Supreme Court of Alabama makes its decision concerning the correctness of the trial court's decision on remandment, then there is a very real possibility that the arguments concerning the provisions of the Natural Gas Policy Act of 1978 are moot.

In any event, all of the Appellants have conceded that Act 434 of was only in effect from September 1, 1979 to May 28, 1980, at which time it was superseded and the anti-passthrough provision was deleted. Therefore, it is the position of the Commissioner of Revenue that since the anti-passthrough

provision no longer exists, and since the latest pronouncement by a court in Alabama is that Act 434 does not levy an increase in the severance tax on natural gas production in the State of Alabama, and as of the present date none of the parties are even sure if the Supreme Court of Alabama will reverse or uphold the decision of the trial court on remandment, then no decision concerning the pass-through provision of Act 434 could have any prospective application.

VII.

A DECISION HOLDING INVALID A PORTION OF ACT 434 WOULD NOT NECESSITATE INVALIDATING THE ENTIRE STATUTE.

Section 3 of Act 434 provides:

> The provisions of this Act are severable. If any part of this Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.
>
> (J. A. 75.)

Thus, from a reading of the Alabama Severance Tax Statute in question, it is clear that the statute contains what is judicially known as a "severability clause." It has long been the rule in American jurisprudence that the effect of a severability clause respecting the constitutionality of a statute is that even if one provision of the statute should be struck

down as unconstitutional, this does not mandate a finding that the entire statute must be struck down, but that it was the intent of the Legislature to preserve the otherwise remaining valid portions of the statute. *Smith v. Cahoon*, 283 U.S. 553 (1931); *Champlin Refining Co. v. Corporation Commission of State of Oklahoma*, 286 U.S. 210 (1932); *Dorchy v. State of Kansas*, 264 U.S. 286 (1924).

In the case of *United States v. Jackson*, 390 U.S. 570 (1968), Justice Stewart stated the rule as follows:

> As said in Champlin Rfg. Co. v. Corporation Commission of State of Okl., 286 U.S. 210, 234, 52 S.Ct. 559, 565, 76 L.Ed. 1062:
>
> > 'The unconstitutionality of a part of an Act does not necesarily defeat *** the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'
>
> 390 U.S. at 584.

The federal courts in Alabama have also recognized that under Alabama law, a severabiiity provision in a legislative act is to be given its full scope and effect. *Shuttlesworth v. Birmingham Board of Education of Jefferson County, Alabama*, 162 F. Supp. 372, *aff'd* 358 U.S. 101 (1958).

In addition, the Supreme Court of Alabama has on numerous occasions held that the inclusion of a severability clause in a statute was persuasive authority that the valid portions of a statute that survive are to be given full force and effect. See: *Beck v. State*, 396 So.2d 645, *on remand*, 396 So.2d 666 (1980); *Comer v. City of Mobile*, 337 So.2d 942 (1976); *Mitchell v. Mobile County*, 294 Ala. 130, 313 So.2d 172 (1975); *Wilkins v. Woolf*, 281 Ala. 693, 208 So.2d 74 (1968). For additional numerous citations, see Alabama Digest, *Statutes*, Key No. 64(1).

The Commissioner submits that since Act 434 contains a severability clause, should this Honorable Court determine that any particular portion of Act 434 is invalid, the remaining portions of the Act should be given full force and effect under Alabama law.

As conceded by the Appellant Oil Companies, Act 434 was signed into law by the Alabama Legislature on July 19, 1979. At the next regular session of the Alabama Legislature on May 28, 1980, Act 79-434 was superseded by Act 80-708. Act 80-708 was virtually identical with Act 79-434 except that it deleted the anti-passthrough provision which the oil companies found objectionable. The Commis-

sioner submits that since the Legislature of Alabama at its next regular session, less than 10 months later, adopted language virtually identical to Act 434 and only deleted the anti-passthrough provision is highly persuasive of the fact that the remaining provisions of Act 434 should be given full force and effect.

Therefore, the Commissioner submits that due to the inclusion of the severability clause and the fact that the Legislature of Alabama, less than 10 months later, adopted virtually the identical language contained in Act 434, any decision holding invalid a particular portion of the Alabama Severance Tax Statute should not necessitate holding the entire statute invalid.

CONCLUSION

In view of the foregoing arguments and cited authorities, Appellee Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, respectfully submits that the decision of the Alabama Supreme Court holding Act 434 is not in violation of the United States Constitution is entirely correct, and is due to be upheld. Therefore, the Appellee Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama respectfully prays that this Honorable Court will render a decision upholding the Opinion of the Supreme Court of Alabama entered in the present actions July 10, 1981.

Respectfully submitted,

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State of Alabama

NOS. 81-1020 and 81-1268

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EXXON CORPORATION, ET AL., Appellants

versus

RALPH P. EAGERTON, JR., as COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, Appellee

---

EXCHANGE OIL AND GAS CORPORATION, ET AL.,

Appellants

versus

RALPH P. EAGERTON, JR., as COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, Appellee

ON APPEALS FROM THE SUPREME COURT
OF THE STATE OF ALABAMA

PROOF OF SERVICE

I, John J. Breckenridge, Counsel of Record for Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24th day of November, 1982, I served copies of the foregoing Brief of Appellee on all parties required to be served as follows:

1. On Appellants Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company, by depositing three copies in a United States post office, with first class postage prepaid, addressed to Louis E. Braswell, Appellant's

counsel of record at P. O. Box 123, Mobile, Alabama 36601.

2. On Appellants Exchange Oil Corporation, Getty Oil Company, and Union Oil Company of California, by depositing three copies in a United States post office, with first class postage prepaid, addressed to Rae M. Crowe, 1101 Merchants National Bank Building, P. O. Box 290, Mobile, Alabama 36601.

3. On Appellants Exchange Oil Corporation, Getty Oil Company, and Union Oil Company of California, by depositing three copies in the United States post office, with first class postage prepaid, addressed to Euel A. Screws, Jr., P. O. Box 347, Montgomery, Alabama 36101.

4. On all other parties to the proceeding below by depositing three copies each in a United States post office, with first class postage prepaid, addressed to their respective attorneys of record, as follows:

To: Robert C. Black, Esq., Attorney for Citmoco Services Inc., Hill Building, Montgomery, Alabama 36104;

To: James R. Seale, Esq., Attorney for Anderman Operating Company, Midroc Operating Company, Pruet Production Company, and Warrior Drilling and Engineering Company, Inc., P. O. Box 2069, Montgomery, Alabama 36103;

To: Macbeth Wagnon, Jr., Esq., Attorney for Alabama Gas Corporation and Alagasco Pipeline Company, 1500 Brown-Marx Building, Birmingham, Alabama 35203;

To: L. Murray Alley, Esq., Attorney for Southern Natural Gas Company, 1900 First National-Southern Natural Building, Birmingham, Alabama 35203;

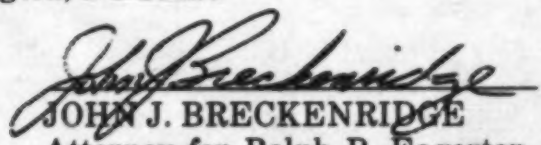
To: Edward S. Allen, Esq., Attorney for Coronado Transmission Company, P. O. Box 306, Birmingham, Alabama 35201;

To: Porter, Gonzalez & Rogers, Attorneys for Petroleum Corporation of Texas, 1800 Guaranty Bank Plaza, Corpus Christi, Texas 78475.

5. On Amici Curiae United States of America and The Federal Regulatory Commission as follows:

To: Honorable Rex E. Lee
Solicitor General
Department of Justice
Washington, DC 20530

To: Honorable A. Karen Hill, Attorney
Federal Energy Regulatory Commission
Washington, DC 20426



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Supplemental Appellee's Brief

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CLERK

NOS. 81-1020 and 81-1268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EXXON CORPORATION, ET AL., Appellants

versus

RALPH P. EAGERTON, JR., as COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, Appellee

EXCHANGE OIL AND GAS CORPORATION, ET AL., Appellants

versus

RALPH P. EAGERTON, JR., as COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, Appellee

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF ALABAMA

SUPPLEMENTAL BRIEF OF APPELLEE

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ARGUMENT

Pursuant to Rule 35.5, *Supreme Court of United States Revised Rules*, the Appellee Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, would like to take this opportunity to present recent authorities and other intervening matters which were not available in time to have been included in the brief of Appellee in chief. In the Appendix to this brief, the Appellee Commissioner has included the recent decision of the Supreme Court of Alabama in the case of *Eagerton v. Terra Resources, Inc., et al.* decided December 10, 1982. As stated in the Appellee's main brief, the decision of the Alabama Supreme Court in *Eagerton v. Exchange Oil and Gas Corporation*, 404 So.2d 1 (Ala. 1981), which is the decision being appealed in the present consolidated actions was reversed and remanded to the trial court for further proceedings. As stated in the attached decision of the Supreme Court of Alabama on December 10, 1982: "After a remand by this Court, the circuit court ordered a refund of substantial amounts of the tax paid on gas production. Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama (the Commissioner), appealed. The above-named companies filed briefs as Appellees; we shall refer to them as the gas producers. (footnote omitted.)" Thus the decision of the Supreme Court of Alabama on December 10, 1982 constitutes a further pronouncement of the highest court of the State of Alabama with regard to the present appeals now before the Supreme Court of the United States.

The Appellee Commissioner has also included in the Appendix the *Petition for Rehearing* and the *Brief*

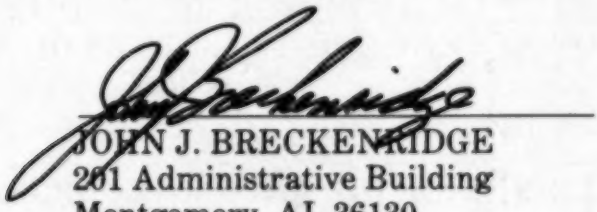
in Support of Application for Rehearing of the oil companies concerning the decision of the Supreme Court of Alabama issued December 10, 1982. The Commissioner advises this Court that the Supreme Court of Alabama overruled the *Petition for Rehearing* of the Appellants oil companies on February 11, 1983.

The Appellee Commissioner of Revenue would also like to refer this Honorable Court's attention to the recent decision of the United States Supreme Court in the the case of *Energy Reserves Group, Inc., v. The Kansas Power and Light Company,* 51 United States Law Week 4106, decided January 25, 1983. In the *Energy Reserves Group* case, Justice Blackmun speaking for the Court stated in a case involving U.S. Const., Art. I, §10, cl. 1, (the Contract Clause): "The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractural relationship. (citations omitted.)"

The Commissioner would point out that since the decision of the Supreme Court of Alabama presently being appealed to this Court specifically stated that "it would be perfectly permissible for the oil and gas companies to raise the price for the first sale of natural gas, subject to the limitations of the Natural Gas Policy Act" (J.A.12), then there was no impairment whatsoever, either substantial or insubstantial of any contractural relationship between the Appellant Oil Companies and their customers. The Commissioner has conceded at page 17 of the Appellee's Brief that "it would be perfectly permissible for the seller to include in the maximum lawful price of the first sale of natural gas the increase attributable to the tax levied

by Act 79-434, so long as the increase was not specifically set out *as a tax* to be passed along." Thus the Commissioner submits that the oil companies, who would be allowed to raise the maximum lawful price on their first sale of natural gas under the provisions of the Natural Gas Policy Act, suffer no contractural impairment whatsoever because of the Pass-through Prohibition contained in Act 79-434.

Respectfully submitted,



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ON APPEALS FROM THE SUPREME COURT
OF THE STATE OF ALABAMA

PROOF OF SERVICE

I, John J. Breckenridge, Counsel of Record for Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of February, 1983, I served copies of the foregoing Brief of Appellee on all parties required to be served as follows:

1. On Appellants Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company, by depositing three copies in a United States post office, with first class postage prepaid, addressed to Louis E. Braswell, Appellant's counsel of record at P.O. Box 123, Mobile, Alabama 36601.

2. On Appellants Exchange Oil Corporation, Getty Oil Company, and Union Oil Company of California, by depositing three copies in a United States post office, with first class postage prepaid, addressed to Rae M. Crowe, 1101 Merchants National Bank Building, P.O. Box 290, Mobile, Alabama 36601.

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To: Edward S. Allen, Esq., Attorney for Coronado Transmission Company, P.O. Box 306, Birmingham, Alabama 35201;

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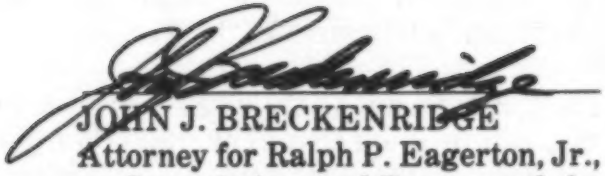
5. On Amici Curiae United States of America and The Federal Regulatory Commission as follows:

To: Honorable Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

To: Honorable A. Karen Hill, Attorney
Federal Energy Regulatory Commission
Washington, DC 20426



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December 10, 1982

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1982-83

Ralph E. Eagerton, Jr.
as Commissioner of Revenue of the State of Alabama

v.

Terra Resources, Inc., et al.
Appeal from Montgomery Circuit Court

81-128

ALMON, JUSTICE.

This appeal necessitates further interpretation of the oil and gas severance tax statute which was the subject of *Eagerton v. Exchange Oil and Gas Corporation*, 404 So. 2d 1 (Ala. 1981). The question is whether an exception in the statute swallows the rule as to gas producers. We hold that it does not, and reverse.

Terra Resources, Inc. (Terra), Petroleum Corporation of Texas (PETCO), and other companies filed suit to recover oil and gas severance taxes paid under protest. After a remand by this Court[1], the circuit court

[1] *Eagerton v. Exchange Oil & Gas Corp.*, 404 So. 2d 1 (Ala. 1981); various oil producing companies have also appealed after remand of the action.

ordered a refund of substantial amounts of the tax paid on gas production. Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama (the Commissioner), appealed. The above-named companies filed briefs as appellees[2]; we shall refer to them as the gas producers.

In 1979 the Alabama Legislature passed an Act, "To amend Code of 1975, Sections 40-20-2 and 40-20-8, so as *to increase the rate of tax;* to provide further for distribution of the proceeds of the tax; and to provide certain exemptions from the increased rate." 1979 Ala. Acts No. 79-434, p. 687 (emphasis added).[3] Prior to this act, the title of § 40-20-2 was "Levy and *amount of tax upon* business of producing or *severing* oil or *gas* from soil, etc., generally." (Emphasis added.) Nevertheless, the gas-producing appellees argue that the "increase" enacted in Act No. 79-434 of the tax upon the business of producing oil or gas only applies to gas production if a *gas* well produces 26 barrels or more of *oil* per day.

In other words, Act No. 79-434 raised the four percent (4%) previously found in §40-20-2 to six percent (6%). One of the exemptions mentioned in the title as set out above reads, "All wells producing less than 26 barrels of oil per day shall be taxed at the rate of four per centum (4%) of the gross value of said oil of gas at the

[2] Three other gas companies who were parties below adopted the postion of the above-named appellees and all five filed motions to dismiss the appeal. In view of our decision on the merits, these motions are denied.

[3] The legislature amended this code section again in 1980, but that act is not at issue here. Acts of Alabama 1980, Act No. 80-708.

point of production."[4] The gas producers herein contend that because this sentence refers to "all wells," not "all oil wells," and to "said oil or gas," it exempts from the two percent increase of the statute gas produced at wells which do not also produce the stated amount of oil.

This Court, in *Eagerton, supra*, "agree(d) that the exemption in the Act refers to all wells producing either oil or gas." 404 So. 2d at 8. No analysis accompanied this remark, however, and the weight of the holding on this point rested elsewhere: "Since the trial court recognizes that one or two of the plaintiffs' wells do produce more than 26 barrels of oil, it was improper to hold that Act No. 79-434 did not apply to those plaintiffs." *Id.* Before we follow the above virtually obiter dictum agreement with the gas producers' position, therefore, we feel obliged to examine the matter more closely.

That the statute as a whole proposes to increase the tax on gas as well as oil can be gleaned not only from the short titles set out above, but also from other language in the statute. For instance, the sentence immediately preceding the twenty-six barrel exemption reads, "The amount of such tax shall be measured at the rate of six per centum of the gross value of said oil or gas at the point of production." It does not seem reasonable that a tax increase levied in one sentence should be effectively negated by an obscure reference in the following sentence. Statutes are to be construed as a whole and the parts thereof harmonized if possi-

[4] Act No. 80-708 (see note 3) contains an identically worded exemption for wells producing less than 40 barrels of oil per day.

ble. *Darks Dairy, Inc. v. Alabama Dairy Commission*, 367 So. 2d 1378 (Ala. 1979); *In re Ashworth*, 291 Ala. 723, 287 So. 2d 843 (1974), *Lee Optical Co. of Alabama v. State Bd. of Optometry*, 288 Ala. 338, 261 So. 2d 17 (1972).

Exemptions from taxation are to be strictly construed against the exemption and in favor of the right to tax, and the burden is on one seeking an exemption to clearly establish the right. *Community Action Agency of Huntsville v. State*, 406 So. 2d 890 (Ala. 1981); *Title Guarantee Loan & Trust Co. v. Hamilton*, 238 Ala. 602, 193 So. 107 (1940); *Brundidge Milling Co. v. State*, 45 Ala. App. 208, 228 So. 2d 475 (1969). To be sure, there is a countervailing rule of construction that taxing statutes are to be construed strictly in favor of the taxpayer and against the taxing authority. *State v. Hall*, 278 Ala. 359, 178 So. 2d 518 (1965); *Gottlieb v. City of Birmingham*, 243 Ala. 579, 11 So. 2d 363 (1943). We regard the exemption rule as more specific, however, and more directly pertinent to this case.

Futhermore, we give favorable consideration to the Commissioner's interpretation because he administers the statute and has expertise on the subject. This rule of construction applies only where the statute is of doubtful meaning - which is emphatically the case with this provision - and only to aid the court in determining legislative intent - which is also unclear here. The Commissioner's interpretation is not binding on the Court, but is persuasive. *See, Broadwater v. Blue & Grey Patio Club*, 403 So. 2d 209 (Ala. 1981); *Hulcher v. Taunton*, 388 So. 2d 1203 (Ala. 1980); *Employees' Retirement System of Alabama v. Oden*, 369 So. 2d 4

(Ala. 1979); Moody v. Ingram, 361 So. 2d 513 (Ala. 1978); *Alabama Public Service Commission v. Continental Tennessee Lines*, 284 Ala. 27, 221 So. 2d 385 (1969); *Buchanan v. State*, 274 Ala. 592, 150 So. 2d 200 (1962); *Glencoe Paving Co. v. Graves*, 266 Ala. 154, 94 So. 2d 872 (1957); *Dixie Coaches, Inc. v. Ramsden*, 238 Ala. 285, 190 So. 2d 92 (1939).

The Commissioner refers to the sentence in questions as the "stripper well exemption." He states that courts recognize the term "stripper wells" as referring to marginally productive wells, generally defined as producing less than 10 barrels of oil or a proportionate number of cubic feet of gas per day. *See, e.g., In re Dept. of Energy Stripper Well Exemption*, 520 F. Supp. 1232 (D. Kan. 1981).

The Commissioner claims that by limiting the exemption to wells producing less than 26 barrels of oil per day, the legislature has provided an exemption for oil stripper wells. He contends that the words "or gas" in the sentence are mere surplusage, included here only in a formulaic repetition of the words "oil and gas" or "oil or gas" throughout the Act. This reasoning leaves gas stripper wells out of the coverage of the exemption, but the burden is on the gas producers to prove that they come within the terms of the exemption anyway. The Commissioner points out that an equivalence between oil volume and gas volume can be computed by converting both to BTU's (one barrel of oil being roughly equivalent to 6,000 cubic feet of gas), and seems to suggest that this method could provide a definition for gas stripper wells under the statute. This question is not properly presented for review, so

we decline to rule on it. We do feel that the presumption against exemptions would create a hurdle for the gas producers in seeking such an interpretation.

The gas producers argue that both the legislative history and a literal reading of the statute prove that the legislature did not intend to limit the exemption to oil wells. We do not agree.

The gas producers called Mr. Louis G. Green, the director of the Legislative Reference Service, to testify concerning drafts of the bill which became Act 79-434. Mr. Green's office helped Representative Hines prepare the bill. Two of the drafts in Mr. Green's file began the exemption in question with the words "all oil wells" instead of "all wells." The gas producers assert that because the final bill did not say "All oil wells," gas wells which do not produce 26 barrels of oil per day are exempt from the increase levied by Act No. 79-434.

This is clearly irrelevant evidence. Without any proof that the drafts beginning with "all oil wells" were ever introduced in the legislature, these documents are no indication of the legislative intent. Nor is the fact that Mr. Hines introduced a version without the word "oil" included evidence of legislative intent. The motives or reasons of an individual legislator are not relevant to the intent of the full legislature in passing the bill. *James v. Todd*, 267 Ala. 495, 103 So. 2d 19 (1957).

Although there is some logic to the gas producers' reading — that *any* well which produces less than 26 barrels of oil per day shall be taxed at four percent of

the value of all oil *and gas* from the well — we find it implausible that the legislature would enact a statute to increase the severance tax on oil and gas and then obliquely exempt all gas from the increase except for gas which happens to come from wells which also produce substantial quantities of oil. Such a broad exemption should be clearly set out if such is the legislative intent. Nearly all of the gas producers' wells would be exempt if we were to accept their reading to the statute. We do not find that they have met their burden of proving that they come within the exemption.

The statement by this Court that the exemption refers to all wells producing either oil or gas was made in conclusory terms after a long discussion of other complicated issues. After fuller consideration, we disagree with the position urged by the gas producers and hold that the "26 barrels of oil" exemption does *not* serve to exempt virtually all gas production in the state from the increase levied by the statute.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

All the Justices concur.

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1982-83

RALPH P. EAGERTON, JR., As Commissioner of Revenue of the State of Alabama	*	
Appellant	*	
Vs.	*	No. 81-128
TERRA RESOURCES, INC., et al.,	*	
* Appellees.		

PETITION FOR REHEARING

Come now the Appellees in the above styled cause and move the Court to grant rehearing in the above styled cause on the following grounds:

1. The ruling of the Court is based on findings of fact which do *not* appear at any point in the record, and

2. The case of *James v. Todd*, 267 Ala. 495, 103 So.2d 19 (1957) cited by the Court as the basis upon which the initial version of Act 434 should be excluded from evidence is not in point.

BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

I. The findings of fact with respect to oil and gas production in Alabama, at page 7 of the Opinion, are not supported by the record and are in part untrue.

The exemption which the Court interpreted is as follows:

> "*All* wells producing less than 26 barrels of oil per day shall be taxed at the rate of four percent of the gross value of said *oil or gas* at the point of production." (Emphasis by the Court at p. 7)

The Opinion of the Court held that the producers' reading of the literal wording of the 26 barrel exemption is logical (p. 7).[1]

After holding that there is "some logic" to the plain meaning of the words, the Court then, in its Opinion at page 7, finds that it is "implausible" that the legislature would enact such a statute where the effect would be to "exempt virtually all gas production in the State from the increase levied by the statute."

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[1]During oral argument, Mr. Chief Justice Torbert said to counsel for the State — the "legislature didn't put it (the exemption) down the way you are arguing it." Justice Torbert also pointed out that the wording of the exemption itself, as underlined in the Court's Opinion at page 7, evidenced an indication that the statute could be construed contrary to the construction which the State seeks to put upon it.

There is not one scintilla of evidence in the record upon which to base the finding that "virtually all gas production in the State" would be exempted. The State offered no evidence and filed no counter affidavits in opposition to the Appellees' motion for summary judgment, even though that information was readily available to the State from the records of the State Oil and Gas Board in Tuscaloosa where records of production are kept on a monthly basis as to each and every well in the State.

During oral argument, counsel for the State made the unqualified statement that *"100% of the gas will be exempt if the Court buys the argument of the gas companies."* We submit to this Court that that statement is totally false and totally without any foundation in the record whatsoever.

Furthermore, the State offered no evidence and there is none in the record of any type or character whatsoever from which any conclusions can be based as to the types of production which would be exempt and that which may be taxed. The State simply offered no evidence on these points other than the statements of counsel made during oral argument.

We submit that even though the Court has given "favorable consideration to the Commissioner's interpretation" because he administers revenue statutes is certainly one rule of construction, but to stretch that rule to questions of fact where the Commissioner has offered no evidence, filed no affidavits, and where the statement is simply not true, the process of summary judgment is perverted by extending to the Commissioner a power and/or mandate not envisioned by the

Alabama Rules of Civil Procedure.

Thus, we submit that if the Court's decision is based, as it seems to be upon the proposition that "virtually all gas production in the State" would be exempted if the Court rules in favor of these producers, rehearing should be granted to straighten out a simple factual matter or at least *the case should be remanded* to determine wherther "virtually all of the gas production in the State" is involved here.

There are obviously large fields which produce large quantities of gas in south and southwest Alabama which would remain unaffected and these are the largest fields containing the largest reserves with the most highly productive wells in the entire State. We believe these fields produce at the least a majority, if not considerably more, of the State's gas from wells not affected by this exemption.[2] We know it does not exempt 100%, as the State's attorney contends, but without checking the records, we cannot and will not state a finite percentage as the State has done.

In fact, we believe that the State would retract its statement made to the Court during oral argument that 100% of the gas in the State would be affected, and we are certain that it will if the State would simply soncult the records of the Oil and Gas Board.

This case came to this Court on the unopposed affidavits of these producers. Those affidavits merely

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[2]Mr. Victor Vernon of the Legislative Fiscal Office testified that the exemption excluded only 7% of statewide production.

identified the wells and stated under oath that they produced less than 26 barrels of oil per day. At no time did the State offer any evidence as to statewide production and/or the proportion or percentage which would be affected by the case now before the Court.

II. Legislative History/The Content of the Initial Bill Was Clearly Admissible Under Alabama Decisions.

At page 6 of the Court's Opinion, the Court holds that "the fact that Mr. Hines introduced a version [of the bill] without the word 'oil'. . .is clearly irrelevant." The Court held that "motives or reasons of an individual legislator are not relevant in establishing the intent of the full legislature in passing the bill." The Court relied upon the case of *James v. Todd, supra,* as cited by the Commissioner, for this proposition and disregarded the language of the bill prior to substitution in Ways and Means by its sole sponsor, Mr. Hines.

There are several reasons why *James v. Todd, supra,* is distinguishable and not controlling here. First, the statute itself contains a "legislative intent or purpose clause" which clearly sets forth the purposes of the Act. In *James v. Todd,* the legislation in question applied sanitation regulations to out of state milk producers. Those out of state milk producers brought an action and attempted to show by the testimony of members of the legislature that the legislative "motive" was in reality to control prices. However, the Act itself, on its face, showed that the legislative "intent" was to provide the inhabitants of the State of

Alabama with a sanitary and healthful supply of milk. In this connection, the legislative intent section of the Act provided, in part, as follows:

> "The purpose of this Act is to utilize existing agencies . . . in regulating production processing and distribution of milk and milk products to the end that the inhabitants of this State shall be supplied with a wholesome and healthful supply of milk, cream, milk products and by-products thereof. It is terefore declared to be in the public interest that milk . . . be produced . . . and otherwise handled under requirements as hereinafter provided for and as otherwise provided by law."

Thus, since the statute on its face contained a legislative purpose clause, the Court held that the "motive" of the legislature's enacting the sanitary measures could not be inquired into by the "judicial department."

Thus the case of *James v. Todd* is clearly distinguishable, since Act 79-434 has no "legislative purpose" or "intent" provisions.

We submit that to exclude evidence in the form of earlier versions of the bill, both those introduced by Representative Hines and those requested by him from the Alabama Reference Service, is contrary to the rules of evidence with respect to statutory construction long adhered to by decisions of this Court.

Clearly, legislative "history" such as an earlier version of the bill can be introduced and is relevant in determining the intent.

Finally, legislative "motive" as disregarded in *James v. Todd* is obviously quite different from legislative "intent." The legal definition of these two terms is as follows:

> "Intent and motive are not in law one and the same thing . . . . Intent in the legal sense is the *purpose* to use a particular means to effect certain results; whereas, 'motive' is a *reason* which leads minds to desire that result."

Black's Law Dictionary, 4th ed., p. 947.

Thus, *James v. Todd* is not controlling.

In *Eagerton v. Exchange, 404 So.2d 1 (1981),* Mr. Justice Beatty speaking for the full Court held that the Court could not go behind the plain wording of the Act when considering whether the Act was to be applied as a statewide measure or whether it was to be construed to apply only to one county or one geological formation. Now the Court, *Eagerton* II, holds that the Court must go behind what is conceded by all to be the plain wording of the statute, disregard language of an earlier version of the bill and accept statements of counsel made during oral argument to establish that the plain meaning of the words is "implausible" because "virtually all gas production in the State" would be exempted "from the increase levied by the statute." (Opinion, p. 7).

We submit that an unbroken line of decisions of this Court for 50 years or more has been departed from under the Court's opinion in this case. This Court has routinely and without deviation looked to legislative *history* to ascertain legislative *intent*, particularly where the statute is ambiguous as the Court hold here. (Opinion, p. 4,5).[3]

In *Eagerton* I, Mr. Justice Beatty, speaking for the entire Court, held that "when the language is clear and unambiguous, there is *no room* for judicial construction."

Mr. Justice Beatty further said that "when the intent of the legislature can be determined from the language of the statute itself, we do not need to resort to *extraneous matters* to determine legislative intent." Thus, since the wording of this exemption is clear, there is no need to resort to extraneous speculation as to what the legislature may have meant or the portion of statewide production which might be involved. In *Eagerton* I, this Court, citing *Alabama Industrial Bank v. State ex rel Avinger*, d 286 Ala. 59, 237 So.2d 108 (1970), held that;

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[3]See, e.g., generally: *Alabama State Board of Health v. Chambers Co.*, 335 So.2d 653 (Ala. 1976); *State Docks Commission v. State ex rel Jones*, 227 Ala. 521, 150 So. 537 (1933) (the Court looked to various aids outside the statute to ascertain legislative intent, viz: journals, reports of committees, substitute bills, etc.); *Morgan v. Board of School Commissioners of Mobile County*, 248 Ala. 22, 26 So.2d 108 (1946) (statements made on the floor during discussion); *Ex parte Southern Bell Tel. & Tel. Co.*, 269 Ala. 139, 143, 99 So.2d 118, 121 (1957) (statements during debate on the floor of the convention); *Board of Revenue of Jefferson County v. Kaiser*, 205 Ala. 289, 88 So. 19 (1921) (affidavits of employees of State Highway Department and State Finance Department were relied on in construing the statutes).

> "Courts can only learn what the legislature intended by what it has said, and *have no right to stray into the mazes of conjecture or search for an imaginary purpose,* in construing [a] statute."

In *Eagerton v. Exchange,* the Court refused to look behind the plain meaning of the statute, but there, in Eagerton II, the Court refuses to look behind the plain meaning of the statute to examine earlier versions of the bill as introduced by the sole sponsor, and then looks behind those words to certain unsupported statements made by counsel for Appellants during oral argument and apparently adopts them *in toto* in order to strike down these Appellees right to an exemption.

Surely, there is something wrong here -- if the Court holds that the plain meaning of the language entitles these producers to a 2% exemption, but that this was not the wish or "intent" of the legislature, the legislature is, of course, free to enact such further legislation as may be necessary. On the other hand, if the Court holds that the phrase "all wells" is indeed ambiguous, then the meaning of that phrase is made even more clear from the changes made by amendment.

We earnestly beseech the Court to follow the plain meaning of the wording of the statute, the prior decisions of this Court and/or the legislative history of Act 434..

In conclusion, we submit that although a determi-

nation made by an administrative agency can be given "favorable consideration" by this Court, the unsupported statements of the Commissioner's attorney, in the absence of any evidence in the record (whether by affidavit or otherwise, from the Commissioner or some knowledgeable witness), is clearly not entitled to any greater weight than that of any other party and/or attorney in the case.

To give the statements of the attorneys for the Commissioner this type of weight in a case involving construction of an exemption from a taxing statute, in effect, gives the Commissioner and/or his attorneys the power to tax as they see fit. In short, this is nothing more or less than taxation without legislation, much less representation.

Respectfully submitted,

(S)

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 23 day of December, 1982, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail properly addressed, and first class postage prepaid.

Appellant's Reply Brief

No. 81-1020

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EXXON CORPORATION, GULF OIL CORPORATION
AND
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Appellants,

versus

RALPH EAGERTON, JR., as Commissioner of
Revenue of the State of Alabama, et al.,
Appellees.

On Appeal From The Supreme Court
of The State of Alabama

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STATEMENT OF THE CASE

Appellants adopt and incorporate by reference the statement of the case contained in their primary brief. (Brief of Appellants at 3-6).

ARGUMENT

I. APPELLANTS ARE NOT PARTIES TO ANY PROCEEDING NOW PENDING IN THE SUPREME COURT OF ALABAMA, NOR ARE THE ISSUES PRESENTED BY THEIR APPEAL PENDING IN THAT COURT

The Commissioner begins his brief with a section titled "Jurisdictional Basis of Appeal" (Brief of Appellee at 1) and repeats some of the same assertions in the section titled "Statement of the Case." (Brief of Appellee at 3-6). The purport of these portions of the Commissioner's brief appears to be a re-assertion of a contention that "Appellant oil companies" are parties to a proceeding pending in the Supreme Court of Alabama in which the same issues are being urged as on their appeal here to the Supreme Court of the United States. The contention is merely a repetition of an invalid claim initially advanced by the Commissioner in his Motion to Dismiss Appeal and refuted by the Appellants in this case (Exxon Corporation, Gulf Oil Corporation, and The Louisiana Land & Exploration Company) in their Brief Opposing Motion to Dismiss Appeal. Furthermore, the very proceeding which the Commissioner contends is pending before the Supreme Court of Alabama was the subject of a final judgment issued by that court on December 10, 1982, which makes it clear that the contentions of the Commissioner are without merit. *See Eagerton v. Terra Resources, Inc.*, _____ So.2d _____ (Ala. 1982), 17 A.B.R. 369 (Dec. 10, 1982).

We would forego any reference to this matter were it not for the ambiguities in the language used in the Commissioner's brief. Such language fails to make it entirely clear that the "oil companies" to whom the Commissioner refers are only those who are the Appellants in Case No. 81-1268, and are not Exxon, Gulf, or Louisiana Land, the Appellants in this case, No. 81-1020. For that reason, we feel that we should again state that the Appellants in this case were not served with Commissioner's Notice of Appeal in the proceeding that was pending in the Supreme Court of Alabama, did not themselves appeal (see Appellants' Brief Opposing Motion to Dismiss Appeal), and did not file any brief or make any argument on that appeal. Moreover, that appeal did not involve any constitutional issues; the recent decision of the Supreme Court of Alabama makes this clear. *See Eagerton v. Terra Resources, Inc.*, _____ So.2d _____ (Ala. 1982), 17 A.B.R. 369 (Dec. 10, 1982). Accordingly, this appeal was proper because the constitutional issues presented hereby had been resolved by the Supreme Court of Alabama in the prior decision of that court from which this appeal was taken.

For these and the other reasons set forth in Appellants' Brief Opposing Motion to Dismiss Appeal, we respectfully submit that the Court has jurisdiction under 28 U.S.C., Section 1257(2).

II. THE ATTEMPT OF THE COMMISSIONER TO REWRITE ACT 434 CANNOT CONCEAL THE STATUTE'S DIRECT CONFLICT WITH THE FEDERAL REGULATORY SCHEME

The basic thrust of the Appellee's brief is that Act 434 does not mean what it says and, therefore, does not invade

an area which the federal government has preempted. 1/ (Brief of Appellee at 9-19). Faced with the analyses advanced in the brief of the United States and the Federal Energy Regulatory Commission, and in the briefs of the Appellants in the instant case and in No. 81-1268, the Commissioner has sought to establish that the Royalty Owner Exemption and the Pass-Through Prohibition actually do not require the producers to pay out of their own pockets the 2% tax increase imposed on both their own share of production and the royalty owner's share of production. According to the Commissioner, while the producers have to "account" for the tax as to both shares of production, they may pass along the increase if they just conceal the fact that it represents a severance tax they have been required to pay.

This contention will not withstand examination. The relevant portions of Act 434 read as follows:

> (d) . . . Any person who is a royalty owner shall be exempt from the payment of any increase in taxes herein levied and shall not be liable therefor. (e) The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of produc-

---

1/ While the Commissioner attempts to separate the Royalty Owner Exemption from the Pass-Through Prohibition, it is clear that both provisions are part of a unified scheme designed to directly allocate the ultimate incidence of the tax increase. The statute, having levied a 2% tax increase on all production, then proceeded to exempt the royalty owner and impose the increased tax burden solely on the producer. As the trial court stated, both provisions (along with the Smackover Provision) were "salient points of Act 434. . . were not in the original bill but were added by amendment. . . at the same time . . . [and] to hold one or more of these provisions invalid but then to hold the remainder of the Act valid. . . would manifestly contravene the legislative intent." (J.A. 68).

> ing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.

1979 Ala. Acts No. 434, Sec. 1. The language of clause "(d)" makes it crystal clear, even if there were no clause "(e)", that a royalty owner cannot be required to bear the tax increase on his share of production. Then clause "(e)" expressly prohibits a pass-through of any of the tax increase. Somewhat redundantly, it specifically requires that the increase be "absorbed and paid" by the producer or severer, who cannot pass on the cost "either directly or indirectly," but must bear the tax "exclusively." 2/

In utter disregard of the statutory language, the Commissioner claims that the producer *can* pass on the tax increase so long as such is accomplished indirectly by calling the pass-through something other than a "tax" (perhaps, for example, calling it merely a "price increase"). But the impact of the Supremacy Clause on Act 434 cannot be avoided by such an impermissible attempt to rewrite the statute.

The Commissioner compounds error by a gross misinterpretation of Section 110(a)(1) of the NGPA (15 U.S.C. §3320 (a)(1)). On pages 17 and 18, he states:

2/ Any doubts concerning whether this language precludes royalty owners from being responsible for their share of tax have been resolved by the trial court, which found that "[t]he Defendant has construed and is enforcing the Act so that the 2% increase cannot be deducted from the royalty owner's share." (J.A. at 40).

> Therefore the Commissioner believes it would be perfectly permissible for the seller to include in the maximum lawful price of the first sale of natural gas the increase attributable to the tax levied by Act 79-434, so long as the increase was not specifically set out as a tax to be passed along.

The problem with this, as the brief of the United States and the Federal Energy Regulatory Commission makes clear (Brief of Amici at 3, 5, 8, 9), is that in the Natural Gas Policy Act, 15 U.S.C. §§3301 *et seq.*, Congress has expressly permitted producers to add to the maximum lawful price any state severance tax. As the government's brief correctly states:

> In the NGPA, however, Congress explicitly provided that consumers are to bear the cost of severance taxes, above and beyond the applicable maximum lawful price, "to the extent necessary" to permit the seller to "recover" such taxes.

(Brief of Amici at 9).

Nor is there any validity to the Commissioner's suggestion that there is an absence of proof that any of the oil companies involved in the trial or subsequent appeals of this case is or was charging the maximum lawful price. (Brief of Appellee at 18-19). A gas purchase contract made plaintiffs' Exhibit 1-D (R. 1427) at trial expressly provides that:

> . . . Buyer agrees to pay Seller, for each MMBTU of gas delivered hereunder, the applicable highest maximum lawful price

> authorized to be paid by Buyer and collected by Seller pursuant to the Policy Act and the regulations, orders or rulings promulgated thereunder.
>
> Should any higher price be allowed at any time for the sale of gas hereunder by the Commission or any governmental authority having jurisdiction over the sale of such gas, by law or permitted following hearing, by settlement, or by rulemaking proceeding, as applicable, then the price to be paid by Buyer to Seller for gas delivered hereunder shall be increased effective as of the date such higher price is prescribed or allowed by law or permitted by order to equal such higher rate.

This provision calls for payment of the maximum lawful price. Section 110(a)(1) of the NGPA permitted the charging of that price *plus* severance taxes, including the additional two percent severance tax sought to be imposed by Act 434. The Act's patent attempt to negate the pervasive regulatory scheme of the NGPA must fail under the Supremacy Clause.

Finally, at the close of this section of the Appellee's brief, the Commissioner "point[s] out that §110(a)(1) of the NGPA specifically requires that the seller may include in the maximum lawful price only those State severance taxes *borne by the seller,*" and the Commissioner then equates the Pass-Through Prohibition of Act 434 with a requirement that the "severance tax must be borne by the producer or severer." (Brief of Appellee at 18). The Commissioner thus deduces that, because both Act 434 and section 110 (a)(1) of

the NGPA require that the "severance tax be borne by the producer or the severer of the oil or gas," the Alabama and federal statutes "could in no way be in conflict," and in fact "dove-tail exactly." (Brief of Appellee at 18). The Commissioner's reasoning is invalid. The producer or severer bears the severance tax when he pays the taxing state and his ability to recoup the payment by increasing the selling price does not mean that he has not borne the tax. The NGPA allows the producer to pass the tax on to the purchaser while Act 434 prohibits this.

III. THE COMMISSIONER CANNOT JUSTIFY THE IMPAIRMENT OF PREEXISTING CONTRACTS THAT THE ROYALTY OWNER EXEMPTION AND THE PASS-THROUGH PROHIBITION EFFECTIVELY ACCOMPLISH

It is indisputable that both before and after the enactment of Act 434 the Appellants had contractual agreements under which they were entitled to require the other party to such agreements to pay or reimburse Appellants for severance taxes. The trial court stipulation (J.A. 76-78) gives examples of such contracts. Royalty owners were required to bear their proportionate share of the severance taxes imposed on all gas or oil produced. Sales contracts with pipeline companies or other purchasers required the buyer to bear any increase in severance tax or the buyers' proportional share of the severance tax imposed.

It is also indisputable that Act 434 directly, through the Royalty Owner Exemption and the Pass-Through Prohibition, effectively deprived Appellants of their contractual entitlements and expectations, forcing Appellants to pay the 2% tax increase and forego obtaining reimbursement from any person of any part of the tax increase despite express

contractual provisions requiring reimbursement.

One would have assumed that such overt denial of pre-existing contractual rights would have led the Commissioner to provide the Court with a plausible argument. Instead, the Commissioner begins his argument by implying that the issue before the Court is whether the parties to a private contract can limit a state's ability to impose a tax and prescribe who shall be under a duty to the state to account for and pay it. This is not the issue. Appellants recognize that the states may constitutionally exercise such authority. This is clear from many decisions including *Barwise v. Sheppard*, 299 U.S. 33 (1936), and Appellants have no complaint over the fact that Act No. 434, just as did the Alabama severance tax law before the enactment of that statute, requires producers to account for and remit the tax to the state.

The problem, of course, lies in that aspect of Act No. 434 which prohibited Appellants, after remitting the tax, from securing their contractual payments and reimbursements from those who had specifically agreed to make them. Yet the Commissioner completely ignores the Court's stated assumption in *Barwise* of the permissibility of stipulations between lessors and lessee "as to who, as between themselves, shall ultimately bear the tax." *Id.* at 40.

The Commissioner blithely concludes his argument on this issue with the comment:

> As a concomitant of the State's taxation power, the Legislature must also retain the authority to determine who shall bear the burden of such taxes without regard to any contractual arrangements between private

> parties, so long as the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.

(Brief of Appellee at 23). Notably, the Commissioner assumes that the Royalty Owner Exemption and the Pass-Through Prohibition do address a "legitimate end" and are "reasonable and appropriate." But the Commissioner does not test his argumentative assumption by analyzing Act 434 under the standards laid down in cases such as *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); or *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).[3/]

The standards enunciated in the relevant cases such as *Blaisdell* and its progeny, when applied to Act 434, require the conclusion that the Royalty Owner Exemption and the Pass-Through Prohibition impair preexisting contractual provisions without any compelling reason for doing so. There was no emergency situation that required protective legislation, and Act 434 contained no duration limit. The Royalty Owner Exemption discourages oil and/or gas production by invidious discrimination against working interest owners. It is a patent effort to favor private individuals (*i.e.*, landowners/royalty owners) rather than protect a broad societal

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3/ Indeed, when the Commissioner seeks to justify the discriminatory impact of Act 434 on working interest owners, he speculates that the discrimination may have been prompted by three conceivable legislative purposes. (Brief of Appellee at 13). Such alleged purposes are inadequate even if offered only in support of the Commissioner's argument about the application of the Equal Protection Clause (see Appellants' discussion, *infra* at 10-15). They are even more inadequate if intended by the Commissioner to comport with the standards that determine the constitutionality of contract impairment.

interest. Finally, the primary purpose of Act 434 obviously was that of raising revenue, and the Royalty Owner Exemption and the Pass-Through Prohibition are inappropriate in meeting this public purpose since they do not raise any revenue; rather, they arbitrarily and unreasonably allocate the tax increase contrary to its allocation under valid contracts held by Appellants.

IV. THE COMMISSIONER CANNOT OFFER ANY REASONABLE JUSTIFICATION FOR ACT 434's ARBITRARY DISCRIMINATION AGAINST WORKING INTEREST OWNERS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE

Apparently unable to refute Appellants proof that Act 434 unconstitutionally imposes different tax rates on working interest owners subject to the Alabama Severance Tax, the Commissioner has not addressed the argument made in Section IV of Appellants' primary brief. As discussed in that section, Act 434 imposed a tax on the entire production and relieved the royalty owner of the burden of the 2% tax increase. Thus, the entire burden of the increase was placed on working interest owners, who were prohibited from passing the tax through to either the royalty interest owners or the purchasers. This burden fell on working interest owners in inverse proportion to the size of their interest which produced the effect that smaller working interest shares could be taxed at almost twice the effective rate of larger shares with respect to the 2% tax increment.

Appellants are unable to discern any basis for the discrimination against smaller working interest shares. By his silence, the Commissioner indicates that he also is unable to discern any basis for this discrimination. This is not a case,

as in *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U.S. 527 (1931), cited by the Commissioner, where the tax discriminates because "there are substantial differences between the occupations separately classified." *Id.* at 537-38. In that case, this Court found that a tax graduated by number of stores owned was rationally based on the advantages of chain stores over individual stores. *Id.* at 541-42. The discrimination against working interest owners more closely resembles that in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933), another case cited by the Commissioner. In that case, this Court could find no rational basis for a tax graduated by number of stores located in different counties. *Id.* at 533.

The Commissioner purports to address the Equal Protection Clause issue of this case in Section IV of his brief (Brief of Appellee at 23-26). The brevity of his argument 4/ is surpassed by its inaccuracy.

In the last two sentences on page 23, the Commissioner erroneously claims that "all of the Appellants have recognized that there are at least two sub-classes of ownership over the production of oil or gas" and that "royalty interest owners and working interest owners are different subclassifications within the definition of 'producers'." A review of our primary brief refutes this contention.

As we said in that brief, the State of Alabama itself, by specific statutory pronouncement, has determined that

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4/ The Commissioner devotes only three pages to the subject and with cavalier disregard ignores every case cited by these Appellants in Sections III and IV of their brief. (Brief of Appellants at 21-31).

working interest owners and royalty owners are in the same class. Alabama Code Section 40-20-2(a) (1975) levied the tax on "producing or severing oil or gas." Alabama Code Section 40-20-1(8) (1975) defined the class of taxpayers, the "producers", to include both the working interest owners and royalty interest owners. This statutory determination, which was not amended by Act 434, is entirely proper. Both such interest owners are in a "mining venture" and "have a direct and beneficial interest in the oil being produced." *Barwise v. Sheppard*, 299 U.S. 33, 37 (1936); *see also Lake Superior Consolidated Iron Mines v. Lord*, 271 U.S. 577 (1926); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923). Nor may they be distinguished on the basis of severing activity; only operators sever oil and gas from the ground and many working interest owners are not operators. Indeed, even Act 434 implicitly recognized that royalty interest owners and working interest owners are members of the same class for purposes of the Alabama severance tax by levying the tax "upon the basis of the entire production in this state, including what is known as the royalty interest." 1979 Ala. Acts No. 434, Sec. 1(b). Similarly, the Alabama Legislature left unchanged the previously enacted statutory language calling for producers to be taxed "in the proportion of their ownership." Ala. Code § 40-20-3(a) (1975).

Our primary brief thus clearly asserts, contrary to the Commissioner's claim, that both working interest and royalty interest owners are members of the same class–because they have been determined by the Legislature to be such, because their joint production is all subject to the severance tax, and because such classification of the persons "committed to and engaged in a common venture for their mutual benefit. . . . is

as reasonable to the lessors as to the lessee." *Barwise v. Sheppard*, 299 U.S. 33, 39 (1936).

Despite this single classification, Act 434 forces some members of the class to bear the tax burdens of other members in violation of equal protection. To support his contention that a legislature may measure a tax by one class and then impose it on a portion of the class, the Commissioner cites *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937). However, in *Carmichael* the legislature had simply defined two classes – employers of eight or fewer employees and all other employers - and exempted the first class from taxation but not the second. The legislature did not – as it did in Act 434 – create and tax one class but require some members of the class to pay the tax imposed on other members. In addition, the Commissioner argues that Act 434 is simply a two-tier tax, wherein the royalty owner pays 4% of its production and a working interest owner pays 6%. However, in fact Act 434 imposes a 6% tax on both royalty owners and working interest owners, but then shifts the burden of the entire tax to the working interest owner, who must pay a tax in excess of 6%.

The Commissioner's effort to find some rational basis for this disparate treatment of members of the same class is an exercise in futility. The Court is told: "The Commissioner submits that there do exist several very probable reasons for the classification set up by the Alabama Legislature, such as encouragement of investment by royalty owners, efficient administration and collection of the tax, as well as other reasons." (Brief of Appellee at 25-26). Presumably, this language is intended to be a shorthand rendition of an argument made in the first section of the Commissioner's brief (although that section purportedly addresses the Supremacy

Clause issues of the case). In any event, on page 13 of his brief, the Commissioner suggests three allegedly rational bases for exempting the royalty owner from the increased severance tax and the placing of its entire burden on the working interest owner. Let us examine each alleged basis:

1. "[I]n the event of a successful operation the royalty owner receives benefits but bears no burden for a possible loss in the event of a nonsuccessful operation." (Brief of Appellee at 13). Now this is certainly true but by what logic does this fact afford a rational basis for relieving the royalty owner from a tax on his share of production and making the working interest owner absorb the tax thereon? To the contrary, logic compels the conclusion that the royalty owner should bear the tax attributable to the oil or gas produced or severed for his account.

2. "[B]y exempting the royalty owner from the payment of the increase in the severance tax the Legislature of Alabama could have been attempting to encourage investment in the search for oil and gas resources in the State of Alabama." (Brief of Appellee at 13). This speculation, one also advanced by the Supreme Court of Alabama (J.A. 10), is similarly untenable and unsupported by any evidence. It is the working interest owners, not the royalty owners, who determine whether to drill a well and who make the investment necessary to do so. Once again, the Commissioner's alleged rational basis for the discrimination against working interest owners advances a matter that supports the propriety of taxing the royalty owner rather than relieving him from the payment of his fair share of the severance tax. 5/

5/ Further, it may be observed that the Royalty Owner Exemption does not exempt any of the oil or gas production from taxation; it therefore does not make any additional funds available for investment in Alabama.

3. "[T]he Legislature . . . may have decided to insure administrative convenience and accuracy of reporting by requiring the person in charge of drilling operations to bear the entire 2% increase." (Brief of Appellee at 13). Notably, the Commissioner does not even attempt to explain how Act 434 insures administrative convenience and accuracy of reporting. The fact is that the reporting and remitting procedures are not improved or even changed by Act 434, but remain exactly the same. Before the Act was adopted, the well operator (the producer in charge of drilling operations) had responsibility for reporting and remitting the tax. *Compare* Ala. Code § 40-20-3 (1975), *with*, 1979 Ala. Acts No. 434, Sec. 1. Under such circumstances it is obvious that "administrative convenience and accuracy of reporting" have not been affected in any respect by Act 434.

Contrary to the Commissioner's suggestion, the trial court did not recognize the rationality of these distinctions, but rather found that ". . . there can be no 'material and substantial distinction' or reasonably related difference which justifies exempting the royalty share of oil and gas production from a well." (J. A. 51).

Thus, the Commissioner fails in his attempt to conjure a rational basis for the inequitable and discriminatory treatment that is arbitrarily accorded working interest owners by the Royalty Owner Exemption and the Pass-Through Prohibition.

V. THE ISSUE REGARDING THE PASS-THROUGH PROHIBITION IS PROPERLY BEFORE THIS COURT

In a section titled "Any Decision Concerning the Anti-Passthrough Provision Cannot Have Any Prospective Application," (Brief of Appellee at 33-35), the Appellee contends

that, for one reason or another, this Court is somehow disabled from deciding the issue of the Pass-Through Prohibition's validity. Appellee's arguments are either erroneous as a matter of law or irrelevant to the issues before this Court.

The Commissioner asserts that Appellants' arguments concerning the NGPA might be moot because a post-remand decision of the trial court on a certain minor issue was on appeal before the Supreme Court of Alabama. However, the Commissioner's argument is itself now moot because the Supreme Court of Alabama has rendered its decision, which does not conform with the Commissioner's predictions. That decision, *Eagerton v. Terra Resources, Inc.*, _____ So.2d _____ (Ala. 1982), 17 A.B.R. 369 (Dec. 10, 1982), is completely irrelevant to this appeal as was discussed in Section I of this brief.

In addition, the Appellee asserts that since the Pass-Through Prohibition was only in effect from September 1, 1979, to May 28, 1980, "no decision concerning the pass-through provision of Act 434 could have any prospective application." (Brief of Appellee at 34-35). It is unclear what the Appellee intends by this statement or what its relevance to this case could be. The relief sought by the Appellants cannot be characterized as either "prospective" or "retroactive." Appellants are merely seeking reinstatement of the Alabama trial court's judgment which declared Act 434 unconstitutional and ordered refunds for taxes paid under that Act for the period from September 1, 1979, until May 28, 1980.[6/] (J.A. 71). During that period of time, the

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6/ Appellants agree with the Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae Supporting

only one at issue, the Pass-Through Prohibition was in effect. The fact that the provision was subsequently repealed in no way impairs the ability of this Court to grant effective relief.

VI. THE UNCONSTITUTIONALITY OF THE PASS-THROUGH PROHIBITION AND ROYALTY OWNER EXEMPTION INVALIDATES THE ENTIRE ACT

In the only state court pronouncement on this issue, the trial court held Act 434 invalid in its entirety, notwithstanding its severability clause:

> The Smackover Proviso, the Royalty Owner Exemption and the Pass-Through Prohibition are all salient points of Act 434. They were not in the original bill but were added by amendment during the legislative process. They were all added at the same time. Each reflected a very important purpose of the legislature. It would violate the principles

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Reversal in its assertion that this case presents a live controversy. The Government, however, is incorrect in stating that, unlike the parties in *Mobil Oil Corp. v. Tully*, "appellants do not seek similar pass-through authority." (Brief of Amici at 16). In the trial court, Appellants sought both a refund and the nullification of Act 434, including its Pass-Through Prohibition. In fact, for gas sold under contracts requiring the buyer to reimburse the seller for severance taxes (J.A. 77), reimbursement of any tax increase owed under Act 434 will be available if the Court invalidates the anti-passthrough provision. This is an additional reason why a live controversy is presented.

> of the foregoing authorities to hold one or more of these provisions invalid but then to hold the remainder of the Act valid. Such a result would manifestly contravene the legislative intent. Accordingly, Act 434 is void and invalid in its entirety.

(J.A. 68). The trial court found this conclusion required by several Alabama Supreme Court decisions from which it quoted. (J.A. 64-67).

As the Commissioner correctly points out, in determining whether the unconstitutionality of part of an act defeats the validity of the remainder, this Court looks to see whether the legislature would have enacted the valid provisions separately. Applying this test, this Court has refused to save constitutional portions of state laws in spite of severability clauses. *See Meek v. Pittenger*, 421 U.S. 349, 371 n. 21 (1975); *Sloan v. Lemon*, 413 U.S. 825, 834 (1973).

Under such test, Act 434 should be invalidated in its entirety. As found by the trial court, the Act was a unified plan, certainly with respect to the provisions whose constitutionality is attacked on this appeal. Contrary to the Commissioner's suggestion, the Legislature did not reenact Act 434 without the contested provisions, but rather the successor to Act 434 included the Royalty Owner Exemption. *See* 1980 Ala. Acts No. 708. Further, even had Act 434 been prospectively reenacted without the contested provisions, this would not prove that the Legislature would have enacted such a statute for the period in question. Act 434 was enacted during a period of long gasoline lines when gasoline was in short supply and the Legislature may well have been, as the Commissioner suggests, unwilling to levy a "consumer tax" (Brief of Appellee at 18), so that the tax

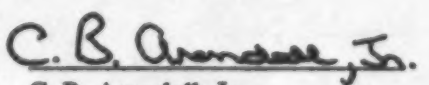
increase would not have been enacted without the Royalty Owner Exemption and Pass-Through Prohibition.

Finally, Act 434 should be invalidated in its entirety because this is necessary to assure that the Pass-Through Prohibition is completely excised. With respect to tax increases whose reimbursement is not purportedly assured by contract. Appellants face the probability of now being unable to pass this tax through. Appellants compete with companies which are not subject to Alabama severance taxes, and while the market may bear passthrough of present taxes, it is unlikely that a right to pass through in 1983 taxes imposed in 1979 will have any meaning. For this reason, and because Act 434 would not have been adopted had not it included both the Royalty Owner Exemption and the Pass-Through Prohibition, the unconstitutionality of these provisions should invalidate Act 434 in its entirety.

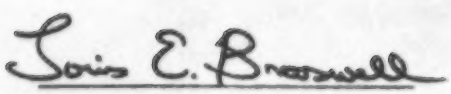
CONCLUSION

The decision of the Alabama Supreme Court declaring that Act 434 is not in violation of the United States Constitution should be reversed and the case remanded to the Supreme Court of Alabama for reinstatement of the trial court's decision which held the Act unconstitutional and ordered tax refunds to Appellants.

Respectfully submitted,



C. B. Arendall, Jr.



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7/ The listing required by Rule 28.1 naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of appellants is contained in Appendix A of Appellant's primary brief.

No. 81-1020

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

EXXON CORPORATION, GULF OIL CORPORATION
AND
THE LOUISIANA LAND AND EXPLORATION
COMPANY

Appellants,

v.

RALPH EAGERTON, JR., as Commissioner of
Revenue of the State of Alabama, et al.

Appellees.

On Appeal From the Supreme Court
of the State of Alabama

PROOF OF SERVICE

I, LOUIS E. BRASWELL, one of the attorneys for Exxon Corporation, Gulf Oil Corporation and The Louisiana Land and Exploration Company, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of February, 1983, I served copies of the foregoing Reply Brief of Appellants on all parties required to be served as follows:

1. On appellee herein, Ralph P. Eagerton, Jr., as Commissioner of Revenue of the State of Alabama, by depositing a copy in a United States post office, with first class postage prepaid, addressed to John J. Breckenridge, his counsel of record, at 201 Administrative Building, Montgomery, Alabama 36130.

2. On all other parties to the proceeding below, by depositing copies in a United States post office, with first class postage prepaid, addressed to their respective attorneys of record, as follows:

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3. On Amici United States of America and The Federal Regulatory Commission as follows:

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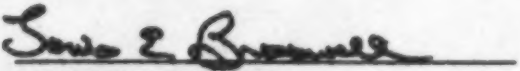

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Amicus Brief for the United States

Nos. 81-1020 and 81-1268

In the Supreme Court of the United States

OCTOBER TERM, 1982

Supreme Court, U.S.
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SEP
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EXXON CORPORATION, ET AL., APPELLANTS

v.

RALPH P. EAGERTON, JR., COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, ET AL.

EXCHANGE OIL AND GAS CORPORATION, ET AL., APPELLANTS

v.

RALPH P. EAGERTON, JR., COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA, ET AL.

ON APPEALS FROM THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Amici will address the question whether an Alabama oil and gas severance tax statute that prohibited producers of natural gas and crude oil from "passing through" the cost of such tax to consumers violated the Supremacy Clause on the ground that it was inconsistent with federal regulation of gas and oil prices pursuant to the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3301 *et seq.*, and regulations promulgated under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. (& Supp. IV) 751 *et seq.*

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

This case presents the question whether an Alabama severance tax statute that barred producers of crude oil and natural gas within the State from "passing through" the cost of such tax to consumers violated the Supremacy Clause of the United States

Constitution on the ground that the statute was inconsistent with federal regulation in this area pursuant to the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. (Supp. IV) 3301 *et seq.*, and the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. (& Supp. IV) 751 *et seq.* At the invitation of the Court, the United States and the Federal Energy Regulatory Commission filed a brief as amici curiae at the jurisdictional stage.

Congress gave the Federal Energy Regulatory Commission the primary responsibility for administering and enforcing the NGPA. 15 U.S.C. (Supp. IV) 3411(a), 3414(b). The President was authorized to administer and enforce the EPAA. 15 U.S.C. 754(b).[1] Accordingly, the United States and the Federal Energy Regulatory Commission have a substantial interest in ensuring that the federal regulatory programs under the NGPA and EPAA are not undermined by inconsistent state legislation.

STATEMENT

1. In 1979 the Alabama Legislature enacted Act No. 79-434 (J.A. 72-75). That statute amended the State's oil and gas severance tax laws by generally increasing the tax rate from the previous level of 4% to 6% of the gross value of the oil or gas at the point of production. Act No. 79-434 became effective on September 1, 1979, and provided in pertinent part (J.A. 74):

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[1] In 1978 the President delegated this responsibility to the Secretary of Energy. See Exec. Order No. 12038, 43 Fed. Reg. 4957 (1978), reprinted in 15 U.S.C. (Supp. IV) 761 note. The EPAA was first administered by the Federal Energy Office within the Executive Office of the President, which was succeeded by the Federal Energy Administration in 1974.

> The privilege tax herein levied shall be absorbed and paid by those persons engaged in the business of producing or severing oil or gas only, and the producer shall not pass on the costs of such tax payments, either directly or indirectly, to the consumer; it being the express intent of this act that the tax herein levied shall be borne exclusively by the producer or severer of oil or gas.

This provision was repealed on May 28, 1980 (81-1020 J.S. 2).

2. Appellants paid the 2% increase in the severance tax under protest and filed suit in the Circuit Court of Montgomery County, Alabama, seeking: (1) a declaratory judgment that Act No. 79-434 was unconstitutional and (2) a refund of the taxes paid under protest (J.A. 18). The circuit court granted relief for appellants (J.A. 17-71), declaring Act No. 79-434 to be null and void and ordering appellee to refund to appellants the taxes they had paid pursuant to the statute (J.A. 71).

The court noted (J.A. 58) that in November 1978, Congress enacted the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. (Supp. IV) 3301 *et seq.*, which establishes maximum lawful prices for "first sales" (generally wellhead or field sales) of various categories of natural gas in intrastate as well as interstate commerce.[2] Section 110(a)(1) of the NGPA, 15 U.S.C. (Supp. IV) 3320(a)(1), permits gas producers to charge the maximum lawful price, *plus* any state severance taxes:

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[2] A major congressional purpose in bringing intrastate sales under federal price regulation was to eliminate the economic distortions resulting from the disparate treatment of unregulated intrastate and regulated interstate natural gas sales. See *Maryland* v. *Louisiana*, 451 U.S. 725, 747 n.22 (1981).

> * * * a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extent necessary to recover—
>
> (1) State severance taxes attributable to the production of such natural gas and borne by the seller * * *.

The circuit court concluded that under the NGPA, natural gas producers such as appellants "are entitled to 'pass through' increases in severance taxes" to their customers (J.A. 59). Because it found that "the Federal Government has preempted the field of cost and pricing of natural gas," the court ruled that the State of Alabama was precluded "from legislating in this field," and it accordingly declared the pass-through prohibition unconstitutional (*ibid*).

The Supreme Court of Alabama reversed (J.A. 2-16). It did not agree that Section 110(a)(1) of the NGPA barred the state legislature from prohibiting the pass-through of severance tax increases. As the court explained (J.A. 12):

> Nowhere in that section is it stated that the oil companies are entitled to "pass-through" increases on state severance taxes. Rather, the Act merely provides that the lawful ceiling on the first sale at the wellhead may be raised if a severance tax is imposed by the states. The two Acts are aimed at entirely different purposes. In other words, although it would be perfectly permissible for the oil and gas companies to raise the price for the first sale of natural gas, subject to the limitations of the Natural Gas Policy Act,

all that Act No. 79-434 requires is that the increase in severance tax mandated by that Act be borne by the producer or severer of the oil or gas. Thus, the pass-through prohibition contained in Act No. 79-434 does not conflict with the Natural Gas Policy Act of 1978, and the trial court's finding to that effect is due to be reversed.

SUMMARY OF ARGUMENT

Alabama Act No. 79-434 (1979 Ala. Acts), which barred gas and oil producers from passing through the 2% severance tax increase, was unconstitutional under the Supremacy Clause because it was preempted by the Natural Gas Policy Act of 1978 (NGPA) and by regulations issued under the Emergency Petroleum Allocation Act (EPAA).

The Alabama statute directly conflicted with Section 110(a)(1) of the NGPA, 15 U.S.C. (Supp. IV) 3320(a)(1), which provides that natural gas producers may pass on to consumers the costs of state severance taxes, even where recovery of such taxes pushes the price for first sales of the gas above the applicable maximum lawful price established in the NGPA. Under the Alabama scheme, however, a producer that was already charging the maximum lawful price for its gas would not have been allowed to recover the increased severance tax from the purchaser. The state statute was thus clearly invalid insofar as it barred the pass-through of severance taxes to natural gas consumers.

The pass-through prohibition in the Alabama statute was also invalid as applied to crude oil producers in the state. Under the regulatory system established in the EPAA, both Congress and the responsible Executive Branch officials had established certain cate-

gories of crude oil that were completely exempted from price controls. The elimination of price controls was based on a determination that total decontrol of prices for these categories of crude oil was essential to further the objectives of the EPAA and other national energy goals. The state pass-through prohibition conflicted with this federal policy of permitting producers in certain categories to collect from their customers whatever price the market would bear. See *Mobil Oil Corp.* v. *Tully*, 653 F.2d 497 (Temp. Emer. Ct. App. 1981), vacated on other grounds, No. 81-96 (Feb. 22, 1982); *Mobil Oil Corp.* v. *Dubno*, 492 F. Supp. 1004 (D. Conn. 1980), appeal dismissed in part and aff'd in part on other grounds, 639 F.2d 919 (2d Cir.), cert. denied, 452 U.S. 967 (1981).

ARGUMENT

THE PASS-THROUGH PROHIBITION IN THE STATE STATUTE WAS PREEMPTED BY THE NATURAL GAS POLICY ACT OF 1978 AND BY REGULATIONS PROMULGATED PURSUANT TO THE EMERGENCY PETROLEUM ALLOCATION ACT

As this Court recently observed, the preemption doctrine, which has its roots in the Supremacy Clause, requires the courts to examine congressional intent. *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, No. 81-750 (June 28, 1982), slip op. 9. While the preemption inquiry starts from the premise that Congress does not intend to displace state law (see *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)), preemption is compelled where Congress' intent to supersede state law altogether is manifest from either the language or the structure and purpose of the federal statute. Moreover, the Court has reiterated that

> [e]ven where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Fidelity Federal Savings & Loan Association v. *de la Cuesta, supra*, slip op. 10.

Appellants have contended generally that the now revoked pass-through prohibition in Act No. 79-434 (1979 Ala. Acts) violated the Supremacy Clause because it interfered with federal regulation of gas and oil prices. The preemption issue must be analyzed separately with respect to natural gas and crude oil because federal regulation of the prices of those commodities during the relevant period was accomplished through different statutory schemes. We turn first to the question of preemption under the NGPA.

A. Preemption Under The NGPA

It has long been settled that in enacting the Natural Gas Act, 15 U.S.C. 717 *et seq.*, Congress created a comprehensive scheme that occupied the field of regulating wholesale pricing of natural gas in interstate commerce. See, *e.g.*, *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972); *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 519-520 (1947); *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 690 (1947). This

point was recently emphasized in *Maryland* v. *Louisiana*, 451 U.S. 725, 748 (1981):

> The Gas Act was intended to provide the Federal Power Commission, now the FERC, with authority to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682 (1954).

In enacting the NGPA, Congress extended that comprehensive scheme of regulation to wellhead sales of natural gas in interstate and intrastate commerce. 15 U.S.C. (Supp. IV) 3301(21), 3311 *et seq.*

In the instant case, it is clear that the pass-through prohibition of the Alabama statute conflicted with, and was preempted by, Section 110(a)(1) of the NGPA, 15 U.S.C. (Supp. IV) 3320(a)(1). Under the state enactment, the severance tax was to be borne exclusively by the producers, who were not permitted to "pass on the costs of such tax payments, either directly or indirectly, to the consumer" (J.A. 74). In Section 110(a)(1) of the NGPA, however, Congress expressly permitted natural gas producers to recover state severance taxes even where recovery of such taxes pushed the price for first sales of the gas above the maximum lawful price applicable to such first sales. As the Conference Report explained, "[a]ll ceiling prices under this Act are exclusive of State severance taxes borne by the seller * * *." H.R. Conf. Rep. No. 95-1752, 95th Cong., 2d Sess. 90 (1978).[3]

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[3] Congress intended the term "State severance tax" in Section 110(a)(1) to be construed broadly. See H.R. Conf. Rep. No. 95-1752, *supra*, at 91. Section 110(c)(1) of the NGPA, 15 U.S.C. (Supp. IV) 3320(c)(1), defines that term as "any

In rejecting appellants' preemption argument, the Alabama Supreme Court appears to have concluded that both the federal and state statutes permit gas producers to increase their prices in response to an increase in their severance taxes, but that the Alabama statute precluded producers from calling the increase a tax "reimbursement" collected pursuant to contractual authorization (J.A. 12). In the NGPA, however, Congress explicitly provided that consumers are to bear the cost of severance taxes, above and beyond the applicable maximum lawful price, "to the extent necessary" to permit the seller to "recover" such taxes.[4]

Contrary to the scheme of federal regulation embodied in the NGPA, under the Alabama statute a producer that was already charging the maximum lawful price established by the NGPA for a first sale of its gas would not have been permitted to recover the increased severance tax from the purchaser. Thus, the Alabama statute clashed with the federal regulatory scheme by precluding producers from recovering increased severance taxes in both intrastate and interstate sales of natural gas.[5] This conflict between the

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severance, production, or similar tax, fee, or other levy imposed on the production of natural gas * * * by any State * * *."

[4] This is in contrast to other producer costs, such as costs of compressing, gathering and processing, which may be passed through in addition to maximum lawful prices, but only if the Commission, by rule or order, allows the pass-through. See 15 U.S.C. (Supp. IV) 3320(a)(2).

[5] We note that Section 602(a) of the NGPA, 15 U.S.C. (Supp. IV) 3432(a), permits states to set prices for intrastate producer sales of natural gas at levels that are lower than the maximum lawful prices established by Congress. But that provision has no bearing here, because the Alabama

state and federal statutes is a sufficient basis for finding the state statute invalid under the Supremacy Clause.

B. Preemption Under the EPAA

While the Alabama provision at issue was in effect, the federal government controlled the prices of crude oil under the authority of the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. (& Supp. IV) 751 *et seq.*, which was enacted in 1973 in response to unprecedented petroleum shortages and petroleum price increases. 15 U.S.C. 751(a).[6] The EPAA expired by its own terms on September 30, 1981. 15 U.S.C. 760g.

Under the EPAA, the President was required to promulgate regulations governing the allocation and pricing of crude oil and petroleum products. 15 U.S.C. (& Supp. IV) 751(b), 753.[7] Section 4(a) of the Act,

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statute applies to interstate as well as intrastate sales and also because, as the Alabama Supreme Court observed (J.A. 12), the statute at issue did not purport to enact a lower maximum lawful price for the gas.

[6] In enacting the EPAA, Congress found that

> hardships and dislocations [resulting from shortages of crude oil and petroleum products] jeopardize the normal flow of commerce and constitute a national energy crisis which * * * can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

15 U.S.C. 751(a)(3).

[7] The EPAA was first administered by the Federal Energy Office, a part of the Executive Office of the President. It was succeeded by the Federal Energy Administration in 1974 and the Department of Energy in 1978. See note 1, *supra*.

Although the Act authorized the President to delegate his pricing and allocation authority to state as well as to federal

15 U.S.C. 753(a), provided that the regulations shall specify or prescribe the manner of determining the prices of "all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States."

In Section 6(b) of the EPAA, 15 U.S.C. 755(b), Congress explicitly preempted any state legislation that conflicted with regulations promulgated under the Act. Section 6(b) provided that such federal regulations

> shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation * * *.

Congress described this preemption provision as an "essential part" of the EPAA and stated that it was intended to preempt any state law conflicting with the "national allocation scheme contemplated" in the Act. H.R. Rep. No. 93-531, 93d Cong., 1st Sess. 5, 6 (1975).[8]

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agencies and officers (15 U.S.C. 754(b)), no pricing authority was ever so delegated, although certain allocation functions were delegated to the states. *E.g.*, 10 C.F.R. 211.15 (state offices of petroleum allocation); 10 C.F.R. 211.17 (state set-aside).

[8] In *Mobil Oil Corp.* v. *Tully*, 653 F.2d 497 (Temp. Emer. Ct. App. 1981), vacated on other grounds, No. 81-96 (Feb. 22, 1982), New York tax officials argued that the preemption clause of the EPAA applied only to preemption by the agency's *allocation* regulations. 653 F.2d at 501. The Temporary Emergency Court of Appeals, a court that is "intimately familiar with the intricacies of federal energy regulation" (*Tully* v. *Mobil Oil Corp.*, No. 81-96 (Feb. 22, 1982), slip op.

The EPAA price regulations that governed the prices that producers could charge for crude oil were codified at 10 C.F.R. Part 212, Subpart D—Producers of Crude Oil, 212.71 *et seq.* Those regulations governed "each first sale of domestic crude oil," and generally divided crude oil into price-controlled crude oil and uncontrolled crude oil.

Prices for controlled crude oil were established by reference to posted prices on certain base dates. 10 C.F.R. 212.73, 212.74.[9] However, certain categories of crude oil were exempted altogether from price controls. See, *e.g.*, 15 U.S.C. 757(i), 10 C.F.R. 212.54 (stripper well crude oil); 15 U.S.C. 757(j), 10 C.F.R. 212.78 (tertiary enhanced recovery crude oil); 10 C.F.R. 212.79 (newly discovered crude oil); 10 C.F.R. 212.59 (heavy crude oil).[10]

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3), emphatically rejected this argument, finding that while that clause refers to preemption of "any program for the allocation of crude oil * * *" (15 U.S.C. 755(b)), it was intended to apply to price limitations as well. 653 F.2d at 502. The statute consistently used the term "allocation" to include price matters. For example, Section 4(a), the section containing the basic authority to regulate, was entitled "Mandatory Allocation" and directed the President to "promulgate a regulation providing for the mandatory allocation of crude oil * * * in amounts specified in * * * *and at prices specified in* * * * such regulation." 15 U.S.C. 753(a) (emphasis added).

[9] Because producers were not permitted to pass through severance taxes *in addition to* their maximum prices, the pass-through prohibition at issue here had no practical effect on the prices producers could charge under this scheme.

[10] We note that the issue of preemption by the EPAA apparently was not raised in the trial court, and, accordingly, the record does not reflect the particular categories into which appellants' crude oil was classified.

In every instance, the decision to remove price controls from the sales of these categories of crude oil was based on a determination that elimination of controls would provide a stimulus to increased domestic production and would, on balance, best further the objectives of the EPAA, other federal energy statutes, and national energy policy. For example, in exempting stripper well crude oil [11] from price controls, the Conference Committee stated that permitting market level prices "will encourage owners and operators of stripper wells to maintain production and to keep these wells in operation for longer periods of time than would be possible if the value of their crude oil production were determined under Phase IV price ceilings." H.R. Conf. Rep. No. 93-624, 93d Cong., 1st Sess. 30 (1973). Similarly, in enacting price incentives for tertiary enhanced oil recovery techniques, Congress stated that its objective was to stimulate additional production. S. Rep. No. 94-1119, 94th Cong., 2d Sess. 71 (1976). See also 43 Fed. Reg. 33679 (1978); 44 Fed. Reg. 51148 (1979) (Department of Energy regulations exempting certain crude oil from price controls in order to effectuate congressional purposes of enhancing recovery).

In short, Congress and the responsible Executive Branch officials determined that the *absence* of price limitations for certain categories of crude oil was necessary to further the nation's energy objectives. See *Consumers Union of the United States, Inc.* v. *Sawhill*, 525 F.2d 1068 (Temp. Emer. Ct. App. 1975)

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[11] Stripper well crude oil is generally defined by the Department of Energy's regulations as crude oil produced from a property whose average daily production in the prior year was less than ten barrels of crude oil per well. 10 C.F.R. 212.54.

(en banc). The pass-through prohibition in the Alabama statute, which was applicable to all crude oil produced in the State, conflicted with the federal policy of permitting producers in certain categories to collect from their customers whatever price the market would bear. In similar circumstances, this Court has stated that:

> "where failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," States are not permitted to use their police power to enact such a regulation.

Ray v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978), quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 774 (1947).[12]

Two lower courts adhered to this analysis in invalidating similar state price control measures that conflicted with federal policies under the EPAA. In *Mobil Oil Corp.* v. *Tully*, 653 F.2d 497 (Temp. Emer. Ct. App. 1980), vacated on other grounds, No. 81-96 (Feb. 22, 1982), the Temporary Emergency Court of Appeals (TECA) held that a pass-through prohibition on New York's 2% gross receipts tax on oil companies was preempted by the EPAA. 653 F.2d at 502. In holding that the state provision upset the balance of the federal scheme, TECA relied on the

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[12] See also *Edgar* v. *MITE Corp.*, No. 80-1188 (June 23, 1982), slip op. 5-9 (opinion of White, J.), where Justice White, joined by the Chief Justice and Justice Blackmun, concluded that a state corporate takeover law was preempted because it frustrated the neutrality objectives of a federal statute governing tender offers even though there was no impossibility of compliance with both statutes.

congressional recognition that petroleum shortages presented a national problem requiring a national solution. *Id.* at 500. Under the state program, the court noted,

> [t]he sellers will receive a greatly diminished net income from sales in this state, as compared to neighboring states.
>
> Furthermore, the sellers, in order to recoup this loss, will try to pass on the cost of the franchise tax to purchasers in other states. To the extent that they are able to pass on the tax, the goal of equitable pricing is not met.

Id. 653 F.2d at 501. The court concluded that New York's anti-pass-through law was an "attempt * * * to affect the structure of prices charged by the oil companies pursuant to federal regulation" and as such was "in conflict with the objectives of the program." *Id.* at 502.

Similarly, in *Mobil Oil Corp.* v. *Dubno*, 492 F. Supp. 1004 (D. Conn. 1980), appeal dismissed in part and aff'd in part on other grounds, 639 F.2d 919 (2d Cir.), cert. denied, 452 U.S. 967 (1981), the district court invalidated a provision of a Connecticut gross receipts tax on a group of oil companies which limited the pass-through of that tax to consumers. Connecticut's tax, unlike New York's, applied only to products that had been exempted from federal regulation under the EPAA. The district court held that the exemption of these products from federal price controls represented "an affirmative federal decision that petroleum products should be free from *all* price regulation, and that the EPAA objectives will best be served by an unregulated free market subject only to standby federal controls." 492 F. Supp. at 1013-1014 (emphasis in original). The court accordingly found the pass-through limitation to be " 'an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress' in enacting the EPAA." 492 F. Supp. at 1014, quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

The Alabama pass-through provision at issue in this case was equally in contravention of the EPAA regulations. By adding price restrictions not found in the federal laws governing the price of crude oil, Alabama interfered with the careful balance of price control and production incentives established under the EPAA. Accordingly, the provision violated the Supremacy Clause.

C. "Case or Controversy" Considerations

In *Tully* v. *Mobil Oil Corp.*, No. 81-96 (Feb. 22, 1982), this Court noted that, in view of the expiration of the EPAA, the operation of the New York anti-pass-through provision was no longer barred by conflicting federal law. Accordingly, the Court questioned whether any live issues remained in the case to supply the constitutional requirement of a case or controversy (see *Powell* v. *McCormack*, 395 U.S. 486, 497 (1969)), and it remanded the case to TECA for further consideration of this point. The disposition in *Tully* should not control the outcome of this case.

Tully was an action for declaratory and injunctive relief in which the oil companies, despite the expiration of the EPAA, sought to establish their legal authority to pass through taxes that were paid or accrued prior to the EPAA's expiration date, notwithstanding the fact that the state pass-through prohibition continued in full force. Here, the appellants do not seek similar pass-through authority; indeed, appellants have no reason to seek any such pass-through authority from the courts since the pass-through prohibition in the state statute has been repealed. More-

over, this case, unlike *Tully*, involves a simple request for monetary relief, *i.e.*, a refund by the State of Alabama of the 2% tax increase that Act No. 79-434 barred appellants from passing through to their customers. The parties at bar appear to have a continuing dispute over appellants' request for recovery of the taxes paid under protest during the discrete period in which both the EPAA and the state statute were in effect.

Clearly, then, whatever impact expiration of the EPAA may have on the present ability of the oil companies in *Tully* to pass through taxes that accrued while the EPAA remained in effect, the expiration of the EPAA should not affect appellants' ability to obtain monetary relief here. Otherwise, the preemption provision in Section 6(b) of the EPAA, 15 U.S.C. 755(b),[13] would be rendered virtually meaningless. A contrary result would mean that while the EPAA was still in effect, the states would have been free to enact legislation that directly conflicted with and undermined the policies of the EPAA, secure in the knowledge that any actions brought to vindicate the supremacy of the federal statute would face dismissal as of midnight on September 30, 1981, when the EPAA was set to expire.[14]

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[13] See page 11, *supra*.

[14] Although the state statute has a severability clause (J.A. 75), we assume, as the trial court found (J.A. 64-68), that the statute was not severable and that a declaration of invalidity with respect to the pass-through prohibition would nullify the tax itself. But even if this is not so, it seems doubtful whether appellants can recoup their losses except from the State. At all events, these are questions that can appropriately be resolved by the state courts on remand.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

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Docket Sheet

NO. 81-1020-ASX (Vide: 81-1268)	TITLE	Exxon Corporation, et al., Appellants v. Ralph Eagerton, Jr., Commissioner of Revenue of Alabama, et al.

DOCKETED	COURT
Dec. 2, 1981	Supreme Court of Alabama

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellants: Louis E. Braswell
	Counsel for Appellees: John J. Breckenridge, James R. Seale
Dec. 2, 1981	Statement as to jurisdiction filed. (Record filed).
Dec. 29, 1981	Order extending time to file a motion to dismiss or affirm until Feb. 7, 1982.
Feb. 5, 1982	Motion to dismiss filed.
Feb. 10, 1982	DISTRIBUTED. 2-26.
Feb. 16, 1982	Reply brief for the appellants filed. (D).
Mar. 1, 1982	The Solicitor General is invited to file briefs in these cases expressing the views of the United States.
Apr. 22, 1982	Brief for the United States and The Federal Energy Regulatory Commission as amici curiae filed. (Vide: 81-1268).
Apr. 28, 1982	DISTRIBUTED. 5-13.
May 17, 1982	Probable jurisdiction NOTED. The case is consolidated with 81-1268 and a total of one hour is allotted for oral argument.

June 15, 1982	Order extending time to file the appellants' brief on the merits until Aug. 30, 1982.
July 1, 1982	Joint appendix filed. (Vide: 81-1268).
Aug. 30, 1982	Brief of appellants filed.
Sept. 1, 1982	Brief for the U. S. and FERC as amici curiae filed. (Vide: 81-1268).
Sept. 13, 1982	Motion of appellants for divided argument and for additional time for oral argument filed. (Also in 81-1268).
Sept. 24, 1982	Order extending time to file the appellees' brief on the merits until Nov. 29, 1982.
Oct. 4, 1982	The motion of appellants for divided argument is GRANTED. The request for additional time for oral argument is DENIED.
Nov. 26, 1982	Brief of the appellee filed. (Vide: 81-1268).
Dec. 14, 1982	CIRCULATED.

(Over)

81-1020

Title	No.

DATE	PROCEEDINGS AND ORDERS
Feb. 14, 1983	Reply brief of the appellants filed. (D).
Feb. 15, 1983	Supplemental brief of the appellee filed. (D). (Vide: 81-1268).
Feb. 17, 1983	Presentation of Newly Enacted Legislation filed. (Supplemental brief of the appellants) (D).
Feb. 22, 1983	ARGUED.